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United Nations

Report of the International Law Commission

on the work of its fiftieth session

20 April-12 June 1998

27 July-14 August 1998

General Assembly

Official Records • Fifty-third Session

Supplement No.10 (A/53/10)

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CHAPTER I

INTRODUCTION

1. The International Law Commission held the first part of its fiftieth session at its seat at the United Nations Office at Geneva, from 20 April to 12 June 1998, and the second part at United Nations Headquarters in New York, from 27 July to 14 August 1998.

A. Membership

2. The Commission consists of the following members:

Mr. Emmanuel Akwei Addo (Ghana)
Mr. Husain Al-Baharna (Bahrain)
Mr. Awn Al-Khasawneh (Jordan)
Mr. Joao Clemente Baena Soares (Brazil)
Mr. Mohamed Bennouna (Morocco)
Mr. Ian Brownlie (United Kingdom)
Mr. Enrique J. A. Candioti (Argentina)
Mr. James Richard Crawford (Australia)
Mr. Christopher John Robert Dugard (South Africa)
Mr. Constantin P. Economides (Greece)
Mr. Nabil Elaraby (Egypt)
Mr. Luigi Ferrari Bravo (Italy)
Mr. Zdzislaw Galicki (Poland)
Mr. Raul Ilustre Goco (Philippines)
Mr. Gerhard Hafner (Austria)
Mr. Qizhi He (China)
Mr. Mauricio Herdocia Sacasa (Nicaragua)
Mr. Jorge E. Illueca (Panama)
Mr. Peter C. R. Kabatsi (Uganda)
Mr. James Lutabanzibwa Kateka (United Republic of Tanzania)
Mr. Mochtar Kusuma-Atmadja (Indonesia)
Mr. Igor Ivanovich Lukashuk (Russian Federation)
Mr. Teodor Viorel Melescanu (Romania)
Mr. Václav Mikulka (Czech Republic)
Mr. Didier Opertti-Badan (Uruguay)
Mr. Guillaume Pambou-Tchivounda (Gabon)
Mr. Alain Pellet (France)
Mr. Pemmaraju Sreenivasa Rao (India)
Mr. Victor Rodríguez-Cedeño (Venezuela)
Mr. Robert Rosenstock (United States)
Mr. Bernardo Sepúlveda (Mexico)

Mr. Bruno Simma (Germany)

Mr. Doudou Thiam (Senegal)

Mr. Chusei Yamada (Japan)

B. Officers and the Enlarged Bureau

3. At its 2519th meeting, on 20 April 1998, the Commission elected the following officers:

Chairman: Mr. Joao Clemente Baena Soares

First Vice-Chairman: Mr. Igor Ivanovich Lukashuk

Second Vice-Chairman: Mr. Raul Ilustre Goco

Chairman of the Drafting Committee: Mr. Bruno Simma

Rapporteur: Mr. Christopher J. R. Dugard

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission[1] and the Special Rapporteurs.[2]

5. On the recommendation of the Enlarged Bureau, the Commission set up a Planning Group composed of the following members: Mr. I. Lukashuk (Chairman), Mr. A. Addo, Mr. N. Elaraby, Mr. L. Ferrari Bravo, Mr. Z. Galicki, Mr. R. Ilustre Goco, Mr. Q. He, Mr. J. E. Illueca, Mr. J. L. Kateka, Mr. M. Kusuma-Atmadja, Mr. D. Opertti-Badan, Mr. E. Pambou-Tchivounda, Mr. B. Sepúlveda, Mr. D. Thiam, and Mr. C. J. R. Dugard (ex officio).

C. Drafting Committee

6. The Commission established a Drafting Committee, composed of the following members for the topics indicated:

Prevention of transboundary damage from hazardous activities: Mr. B. Simma (Chairman), Mr. P. S. Rao (Special Rapporteur), Mr. E. A. Addo, Mr. H. Al-Baharna, Mr. E. J. A. Candioti, Mr. C. P. Economides, Mr. L. Ferrari Bravo, Mr. Z. Galicki, Mr. G. Hafner, Mr. P. C. R. Kabatsi, Mr. R. Rosenstock, Mr. G. Pambou-Tchivounda, Mr. C. Yamada and Mr. C. J. R. Dugard (ex officio).

State responsibility: Mr. B. Simma (Chairman), Mr. J. Crawford (Special Rapporteur), Mr. E. A. Addo, Mr. M. Bennouna, Mr. I. Brownlie, Mr. E. J. A. Candioti, Mr. C. P. Economides, Mr. L. Ferrari Bravo, Mr. Z. Galicki, Mr. G. Hafner, Mr. Q. He, Mr. J. L. Kateka, Mr. I. I. Lukashuk, Mr. T. V. Melescanu, Mr. A. Pellet, Mr. R. Rosenstock, Mr. V. Rodríguez-Cedeño, Mr. C. Yamada and Mr. C. J. R. Dugard (ex officio).

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[1] Mr. A. Pellet, Mr. P. S. Rao and Mr. D. Thiam.

[2] Mr. M. Bennouna, Mr. J. R. Crawford, Mr. V. Mikulka, Mr. A. Pellet, Mr. P. S. Rao and Mr. V. Rodríguez-Cedeño.

Reservations to treaties: Mr. B. Simma (Chairman), Mr. A. Pellet (Special Rapporteur), Mr. A. Addo, Mr. A. Al-Khasawneh, Mr. I. Brownlie, Mr. E. J. A. Candioti, Mr. C. P. Economides, Mr. Z. Galicki, Mr. G. Hafner, Mr. Q. He, Mr. M. Herdocia Sacasa, Mr. P. C. R. Kabatsi, Mr. J. L. Kateka, Mr. I. I. Lukashuk, Mr. T. V. Melescanu, Mr. V. Mikulka, Mr. R. Rosenstock, Mr. V. Rodríguez-Cedeño and Mr. C. J. R. Dugard (ex officio).

7. The Drafting Committee held a total of 17 meetings on the three topics indicated above.

D. Working groups

8. The Commission also established the following Working Groups composed of the members indicated:

(a) State responsibility: Mr. B. Simma (Chairman), Mr. J. Crawford (Special Rapporteur), Mr. Constantin P. Economides, Mr. Nabil Elaraby, Mr. L. Ferrari Bravo, Mr. Z. Galicki, Mr. Q. He, Mr. G. Pambou-Tchivounda, Mr. R. Rosenstock, Mr. C. Yamada and Mr. J. Dugard (ex officio);

(b) Unilateral acts of States: Mr. E. Candioti (Chairman), Mr. V. Rodríguez-Cedeño (Special Rapporteur), Mr. C. Economides, Mr. N. Elaraby, Mr. L. Ferrari Bravo, Mr. G. Hafner, Mr. Q. He, Mr. P. C. R. Kabatsi, Mr. I. Lukashuk, Mr. V. Mikulka, Mr. D. Opertti-Badan and Mr. J. Dugard (ex officio).

(c) Nationality in relation to succession of States: Mr. V. Mikulka (Chairman; Special Rapporteur), Mr. E. A. Addo, Mr. H. Al-Baharna, Mr. I. Brownlie, Mr. E. J. Candioti, Mr. C. P. Economides, Mr. Z. Galicki, Mr. G. Hafner, Mr. R. Rosenstock and Mr. J. Dugard (ex officio);

(d) Prevention of transboundary damage from hazardous activities: Mr. C. Yamada (Chairman), Mr. P. S. Rao (Special Rapporteur), Mr. E. A. Addo, Mr. E. J. A. Candioti, Mr. C. P. Economides, Mr. L. Ferrari Bravo, Mr. G. Hafner, Mr. G. Pambou-Tchivounda, Mr. B. Simma and Mr. J. Dugard (ex officio);

(e) Diplomatic protection: an open-ended Working Group under the chairmanship of Mr. M. Bennouna (Special Rapporteur);

(f) Future topics: Mr. I. Brownlie (Chairman), Mr. R. I. Goco, Mr. Q. He, Mr. M. Herdocia Sacasa, Mr. V. Mikulka, Mr. D. Opertti-Badan, Mr. B. Sepúlveda and Mr. B. Simma.

E. Secretariat

9. Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, opened the session and represented the Secretary-General. Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal

Counsel, represented the Secretary-General. Mr. Manuel Rama-Montaldo, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission. Ms. Mahnoush H. Arsanjani, Senior Legal Officer, served as Senior Assistant Secretary to the Commission; Ms. Christiane Bourloyannis-Vrailas, Mr. David Hutchinson, Mr. George Korontzis and Ms. Virginia Morris, Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

10. At its 2519th meeting, on 20 April 1997, the Commission adopted an agenda for its fiftieth session consisting of the following items:

1. Organization of work of the session.
2. State responsibility.
3. International liability for injurious consequences arising out of acts not prohibited by international law. (Prevention of transboundary damage from hazardous activities.)
4. Reservations to treaties.
5. Diplomatic protection.
6. Unilateral acts of States.
7. Programme, procedures and working methods of the Commission and its documentation.
8. Cooperation with other bodies.
9. Date and place of the fifty-first session.
10. Other business.

CHAPTER II

SUMMARY OF THE WORK OF THE COMMISSION AT ITS FIFTIETH SESSION

11. Concerning the topic of "International liability for injurious consequences arising out of acts not prohibited by international law", the Commission adopted on first reading a set of 17 draft articles with commentaries on prevention of transboundary damage from hazardous activities and decided to transmit the draft articles to Governments for comments and observations (Chapter IV).

12. The Commission considered the preliminary report of the Special Rapporteur on the topic of "Diplomatic protection" which dealt with the legal nature of diplomatic protection and the nature of the rules governing the topic. It established a Working Group to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic and also to provide directions in respect of issues which should be covered by the report of the Special Rapporteur for the next session of the Commission. At the conclusion of its report, the Working Group suggested that the Special Rapporteur, in his second report, should concentrate on the issues raised in Chapter One, "Basis for diplomatic protection", of the outline proposed by the previous year's Working Group[3] (Chapter V).

13. As regards the topic "Unilateral acts of States", the Commission examined the first report of the Special Rapporteur. The discussion concentrated mainly on the scope of the topic, the definition and elements of unilateral acts, the approach to the topic and the final form of the Commission's work thereon. There was general endorsement for limiting the topic to unilateral acts of States issued for the purpose of producing international legal effects and for elaborating possible draft articles with commentaries on the matter. The Commission requested the Special Rapporteur, when preparing his second report, to submit draft articles on the definition of unilateral acts and the scope of the draft articles and to proceed further with the examination of the topic, focusing on aspects concerning the elaboration and conditions of validity of the unilateral acts of States (Chapter VI).

14. With regard to the "State responsibility" topic, the Commission considered the first report of the Special Rapporteur which dealt with general issues relating to the draft, the distinction between "crimes" and "delictual" responsibility, and articles 1 to 15 of Part One of the draft. The Commission established a Working Group to assist the Special Rapporteur in the

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[3] Official Records of the General Assembly, Fifty-second Session, Supplement No. 10 (A/52/10) para. 189.

consideration of various issues during the second reading of the draft articles. The Commission decided to refer draft articles 1 to 15 to the Drafting Committee. The Commission took note of the report of the Drafting Committee on articles 1, 3, 4, 5, 7, 8, 8 bis, 9, 10, 15, 15 bis and A. The Commission also took note of the deletion of articles 2, 6 and 11 to 14 (Chapter VII).

15. As regards the topic of "Nationality in relation to the succession of States", the Commission considered the fourth report of the Special Rapporteur and established a Working Group to consider the question of the possible orientation to be given to the second part of the topic dealing with the nationality of legal persons. The preliminary conclusions of the Working Group are set out in paragraphs 460 to 468 below (Chapter VIII).

16. With respect to the topic of "Reservations to treaties", the Commission considered the third report of the Special Rapporteur concerning the definition of reservations (and interpretative declarations). The Commission adopted seven draft guidelines on definition of reservations, object of reservations, instances in which reservations may be formulated, reservations having territorial scope, reservations formulated when notifying territorial application, reservations formulated jointly and on the relationship between definitions and admissibility of reservations (Chapter IX).

17. As regards the work programme of the Commission for the remainder of the quinquennium, the Commission affirmed that the programme set out at its forty-ninth session should be complied with to the extent possible (Chapter X, section B).

18. It also decided that the Working Group on the long-term programme of work should continue its work at the next session (Chapter X, section C).

19. The Commission further decided that Special Rapporteurs should submit their reports in time so as to ensure their prompt availability in all languages before the beginning of the session (Chapter X, section D).

20. The Commission was represented at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Conference expressed its deep gratitude to the International Law Commission (Chapter X, section E).

21. The Commission commemorated its fiftieth anniversary by: (a) holding a seminar on critical evaluation of the Commission's work and lessons learned for its future; (b) having been presented with two publications, namely: "Making Better International Law: the International Law Commission at 50" and "Analytical Guide to the Work of the International Law Commission, 1949-1997"; and (c) the creation of the International Law Commission Web site maintained by the Codification Division (Chapter X, section F).

22. A useful dialogue on subjects of common interest was conducted with the International Court of Justice, the Asian-African Legal Consultative Committee, the Inter-American Juridical Committee and the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe (Chapter X, section J).

23. A training seminar was held with 23 participants, all of different nationalities (Chapter X, section K).

24. A memorial lecture was given in honour of Mr. Gilberto Amado, a former Brazilian member of the Commission (Chapter X, section L).

25. The Commission agreed that its next session be held at the United Nations Office at Geneva from 3 May to 23 July 1999, and that its session for the year 2000 be held from 24 April to 2 June 2000 and from 3 July to 11 August 2000 (Chapter X, section H).

CHAPTER III

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

26. In response to paragraph 12 of General Assembly resolution 52/156 of 15 December 1997, the Commission would like to indicate the following specific issues for each topic on which expressions of views by Governments either in the Sixth Committee or in written form would be of particular interest in providing effective guidance for the Commission on its further work.

A. Diplomatic protection

27. The Commission would welcome the comments and observations by Governments on the conclusions drawn by the Working Group contained in paragraph 108 of the report.

28. The Commission also requests Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection.

B. Unilateral acts of States

29. The Commission would welcome comments on whether the scope of the topic should be limited to declarations, as proposed by the Special Rapporteur in his first report, or whether the scope of the topic should be broader than declarations and should encompass other unilateral expressions of the will of the State.

30. Comments are also welcome on whether the scope of the topic should be limited to unilateral acts of States issued to other States, or whether it should also extend to unilateral acts of States issued to other subjects of international law.

C. International liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage from hazardous activities)

31. Given the fact that the Commission intended to separate activities which have a risk of causing significant harm from those which actually cause such a harm, for the purpose of developing and applying the duty of prevention, the question arises as to the kind of regime which is or should be made applicable to the latter type of activities.

32. It is generally understood so far that the duty of prevention is an obligation of conduct and not of result. Accordingly, it is suggested that non-compliance with duties of prevention in the absence of any damage actually occurring would not give rise to any liability. The Commission has now decided to recommend a regime on prevention, separating this from a regime of liability. Should the duty of prevention still be treated as an obligation of conduct? Or should failure to comply be subjected to suitable consequences under the law of

State responsibility or civil liability or both where the State of origin and the operator are both involved? If the answer to the latter question is in the affirmative, what type of consequences are appropriate or applicable?

33. What form should the draft articles take: a convention, a framework convention or a model law?

34. What kind or form of dispute settlement procedure is most suitable for disputes arising from the application and interpretation of the draft articles?

D. State responsibility

35. With respect to Part One of the draft, is all conduct of an organ of a State attributable to that State under article 5, irrespective of the jure gestionis or jure imperii nature of the conduct?

36. As regards Part Two of the draft, what is the appropriate balance to be struck between the elaboration of general principles, as is the case in the existing text concerning reparation, and of more detailed provisions, in particular relating to compensation?

37. The Commission has already received very helpful comments from a number of Governments on the draft articles or particular aspects thereof (A/CN.4/488 and Add.1-3). These comments have dealt with a number of key issues, including:

(a) Whether the rules of attribution in Part One, chapter 2, deal adequately with such matters as the role of internal law in determining the status of an "organ" of the State for the purposes of article 5, and the position of privatized entities exercising governmental functions (draft article 7 (b));

(b) Whether draft article 19 should be retained or replaced, or whether the idea of serious breaches of norms of interest to the international community as a whole can better be developed in the draft articles in other ways than through a distinction between "crimes" and "delicts" (see para. 331);

(c) The extent to which the circumstances precluding wrongfulness dealt with in Part One, chapter V, should be treated as entirely precluding responsibility for the conduct in question;

(d) The definition of "injured State" in draft article 40, especially as it concerns breaches of obligations owed erga omes or to a large number of States;

(e) Whether the draft articles should seek to regulate countermeasures in detail, and in particular the link between countermeasures and resort to third-party dispute settlement;

(f) The provisions of Part Three dealing with dispute settlement in general.

38. Governments which have not yet commented on the draft articles may wish to note that it is not too late to do so, and that comments on these or any other issues will be welcomed.

E. Nationality in relation to the succession of States

39. The Commission would welcome comments on the question raised in the report of the Working Group (see para. 468) as regards the future, if any, of the second part of the topic of nationality in relation to the succession of States dealing with legal persons.

40. The Commission further wishes to reiterate its request to Governments for written comments and observations on the draft articles on nationality of natural persons in relation to the succession of States adopted on first reading in 1997, so as to enable it to begin the second reading of the draft articles at its next session.

F. Reservations to treaties

41. The Commission would welcome comments and observations by Governments on whether unilateral statements by which a State purports to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself, would or would not be considered as reservations.

42. The Commission would appreciate receiving any information or materials relating to State practice on such unilateral statements.

G. Protection of the Environment

43. The International Law Commission explored the possibility of dealing with special issues relating to international environmental law. In this connection, the Commission would like to have views and suggestion of States as to which specific issues in this regard they might consider to be the most suitable for the work of the Commission.

CHAPTER IV

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (PREVENTION OF TRANSBOUNDARY DAMAGE FROM HAZARDOUS ACTIVITIES)

A. Introduction

44. At its forty-ninth session, in 1997, the Commission decided to proceed with its work on the topic "International liability for injurious consequences arising out of acts not prohibited by international law", dealing first with the issue of prevention under the subtitle "Prevention of transboundary damage from hazardous activities".[4] The General Assembly took note of this decision in paragraph 7 of its resolution 52/156.

45. At the same session, the Commission appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for this part of the topic.[5]

B. Consideration of the topic at the present session

46. At the present session, the Commission had before it the Special Rapporteur's first report (A/CN.4/487 and Add.1), which it considered at its 2527th to 2531st meetings, held between 8 and 15 May 1998.

47. The report reviewed the Commission's work on the topic of liability since it was first placed on the agenda in 1978, focusing in particular on the question of the scope of the draft articles to be elaborated. This was followed by an analysis of the procedural and substantive obligations which the general duty of prevention entailed. As regards the former, the Special Rapporteur discussed the following principles: prior authorization; international environmental impact assessment; cooperation, exchange of information, notification, consultation and negotiation in good faith; dispute prevention or avoidance and settlement of disputes; and non-discrimination. Concerning substantive obligations, the Special Rapporteur considered the precautionary principle, the polluter-pays principle and the principles of equity, capacity-building and good governance.

48. The Special Rapporteur recommended that, once agreement was reached on the general orientation of the topic, the Commission should review the draft articles adopted by the Working Group in 1996[6] and decide on their possible inclusion in the new draft to be elaborated on the question of prevention.

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[4] Official Records of the General Assembly, Fifty-second Session, Supplement No. 10 (A/52/10), para. 168.

[5] Ibid.

[6] Ibid., Fifty-first Session, Supplement No. 10 (A/51/10), annex I, p. 238.

49. At its 2531st meeting, on 15 May 1998, the Commission decided to refer to the Drafting Committee draft articles 1 (a) (Activities to which the present articles apply) and 2 (Use of terms) recommended by the Commission's Working Group in 1996.[7]

50. At the same meeting, the Commission established a Working Group[8] to review draft articles 3 to 22 recommended in 1996 in the light of the Commission's decision to focus first on the question of prevention. The purpose of such review was to ascertain whether the principles of procedure and content of the duty of prevention were appropriately reflected in the text.

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[7] Ibid. These articles read as follows:

"Article 1

"Activities to which the present articles apply

"The present articles apply to:

(a) activities not prohibited by international law which involve a risk of causing significant transboundary harm [...]

through their physical consequences.

"Article 2

"Use of terms

"For the purposes of the present articles:

(a) 'risk of causing significant transboundary harm' encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) 'transboundary harm' means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) 'State of origin' means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out;

(d) 'affected State' means the State in the territory of which the significant transboundary harm has occurred or which has jurisdiction or control over any other place where such harm has occurred."

[8] For the composition of the Working Group, see para. 8 (d) above.

51. On the basis of the Working Group's discussions, the Special Rapporteur proposed a revised text for the draft articles (A/CN.4/L.556).[9] The Commission

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[9] The proposal of the Special Rapporteur read as follows:

(Note: The number within square brackets indicates the number of the corresponding article proposed by the Working Group in 1996.)

"[Article 3]

"[Freedom of action and the limits thereto]

[deleted]

"Article 3[4]

"Prevention

"States shall take all appropriate measures to prevent, and minimize the risk of, significant transboundary harm.

"[Article 5]

"[Liability]

[deleted]

"Article 4[6]

"Cooperation

"States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing, and minimizing the risk of, significant transboundary harm.

"Article 5[7]

"Implementation

"States shall take the necessary legislative, administrative or other action to implement the provisions of the present articles.

"Article 6[8]

"Relationship to other rules of international law

"Obligations arising from the present articles are without prejudice to any other obligations incurred by States under relevant treaties or principles of international law.

(Note: Consideration of this article should be suspended until a decision is taken on the form of the draft articles.)

"Article 7[9]

"Prior authorization

"1. The prior authorization of a State is required for activities within the scope of the present articles carried out in its territory or otherwise under its jurisdiction or control. Such authorization shall also be required in case a major change is planned which may transform an activity into one falling within the scope of the present articles.

"2. The requirement of prior authorization established by a State under paragraph 1 shall be made applicable in respect of all pre-existing activities within the scope of the present articles.

(Note: Paragraph 2 reflects the content of deleted article 11 (Pre-existing activities).)

"Article 8[10]

"Impact assessment

"1. Any decision in respect of the authorization of an activity within the scope of the present articles shall be based on an evaluation of the possible adverse impact of that activity on persons, property as well as on the environment of other States.

"2. States shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

(Note: Paragraph 2 reflects the content of deleted article 15 (Information to the public).)

"[Article 11]

"[Pre-existing activities]

(Note: The content of article 11 is reflected in article 7[9], paragraph 2.

"[Article 12]

"[Non-transference of risk]

[deleted]

"Article 9[13]

"Notification and information

"1. If the assessment referred to in article 8[10] indicates a risk of causing significant transboundary harm, the State of origin shall, pending any decision on the authorization of the activity, provide the States

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likely to be affected with timely notification thereof and shall transmit to them the available technical and other relevant information on which the assessment is based.

"2. The response from the States likely to be affected shall be provided within a reasonable time.

"Article 10[17]

"Consultations on preventive measures

"1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent, and minimize the risk of, causing significant transboundary harm.

"2. States shall seek solutions based on an equitable balance of interests in the light of article 11[19].

"3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of States likely to be affected in case it decides to authorize the activity to be pursued at its own risk, without prejudice to the rights of any State likely to be affected.

"Article 11[19]

"Factors involved in an equitable balance of interests

"In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 10[17], the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and the availability of means of preventing such harm and minimizing the risk thereof or of repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing such harm and minimizing the risk thereof or restoring the environment;

(d) the economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(e) the degree to which the States likely to be affected are prepared to contribute to the costs of prevention;

(f) the standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

"Article 12[18]

"Procedures in the absence of notification

"1. If a State has reasonable grounds to believe that an activity planned or carried out in the territory or otherwise under the jurisdiction or control of another State may have a risk of causing significant transboundary harm, the former State may request the latter to apply the provision of article 9[13]. The request shall be accompanied by a documented explanation setting forth its grounds.

"2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 9[13], it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations in the manner indicated in article 10[17].

"3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to suspend the activity in question for a period of six months unless otherwise agreed.

"Article 13[14]

"Exchange of information

"While the activity is being carried out, the States concerned shall exchange in a timely manner all information relevant to preventing, and minimizing the risk of causing, significant transboundary harm.

"Article 15

"Information to the public

(*Note*: The content of article 15 is reflected in article 8[10], paragraph 2.)

"Article 14[16]

"National security and industrial secrets

"Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

decided at its 2542nd meeting, on 5 June 1998, to refer to the Drafting Committee the draft articles proposed by the Special Rapporteur, taking into account the comments made in the plenary.

52. The Commission considered the report of the Drafting Committee at its 2560th to 2563rd meetings, on 12 and 13 August 1998 and adopted on first reading a set of 17 draft articles on prevention of transboundary damage from hazardous activities (see sect. C below).

53. At its 2564th meeting, on 14 August 1998, the Commission expressed its deep appreciation for the outstanding contribution of the three Special Rapporteurs, Mr. Robert Q. Quentin-Baxter, Mr. Julio Barboza and Mr. Pemmaraju Sreenivasa Rao, had made to the treatment of the topic through their scholarly research and vast experience, thus enabling the Commission to

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"Article 15[20]

"Non-discrimination

"Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of activities within the scope of the present articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

"[Article 21]

"[Nature and extent of compensation or other relief]

[deleted]

"[Article 22]

"[Factors for negotiations]

[deleted]

"Article 16

"Settlement of disputes

"Any difference or dispute concerning the interpretation or application of the present articles shall be settled expeditiously by mutual agreement through such peaceful means of settlement chosen by the parties, inter alia, submission of the dispute to arbitration or judicial settlement. Failing an agreement in this regard within a period of six months, the parties concerned shall, at the request of any of them, have recourse to the appointment of an independent and impartial fact-finding commission. The report of the commission shall be recommendatory in nature and shall be considered by the parties in good faith."

bring to a successful conclusion its first reading of the draft articles on prevention of transboundary damage from hazardous activities.

54. At the same meeting, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles set out in section C of the present chapter, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2000.

C. Text of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage for hazardous activities) provisionally adopted by the Commission on first reading

1. Text of the draft articles

55. The text of the draft articles provisionally adopted by the Commission on first reading is reproduced below.

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

(PREVENTION OF TRANSBOUNDARY DAMAGE FROM HAZARDOUS ACTIVITIES)

Article 1

Activities to which the present draft articles apply

The present draft articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

Article 2

Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "harm" includes harm caused to persons, property or the environment;

(c) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(d) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft article 1 are carried out;

(e) "State likely to be affected" means the State in the territory of which the significant transboundary harm is likely to occur or which has jurisdiction or control over any other place where such harm is likely to occur.

Article 3

Prevention

States shall take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm.

Article 4

Cooperation

States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more international organizations in preventing, or in minimizing the risk of, significant transboundary harm.

Article 5

Implementation

States shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present draft articles.

Article 6

Relationship to other rules of international law

Obligations arising from the present draft articles are without prejudice to any other obligations incurred by States under relevant treaties or rules of customary international law.

Article 7

Authorization

1. The prior authorization of a State is required for activities within the scope of the present draft articles carried out in its territory or otherwise under its jurisdiction or control as well as for any major change in an activity so authorized. Such authorization shall also be required in case a change is planned which may transform an activity into one falling within the scope of the present draft articles.

2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present draft articles.

3. In case of a failure to conform to the requirements of the authorization, the authorizing State shall take such actions as appropriate, including where necessary terminating the authorization.

Article 8

Impact assessment

Any decision in respect of the authorization of an activity within the scope of the present draft articles shall be based on an evaluation of the possible transboundary harm caused by that activity.

Article 9

Information to the public

States shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present draft articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 10

Notification and information

1. If the assessment referred to in article 8 indicates a risk of causing significant transboundary harm, the State of origin shall, pending any decision on the authorization of the activity, provide the States likely to be affected with timely notification thereof and shall transmit to them the available technical and other relevant information on which the assessment is based.

2. The response from the States likely to be affected shall be provided within a reasonable time.

Article 11

Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent, or to minimize the risk of, significant transboundary harm.

2. States shall seek solutions based on an equitable balance of interests in the light of article 12.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of States likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.

Article 12

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 11, the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;

(d) the degree to which the States of origin and, as appropriate, States likely to be affected are prepared to contribute to the costs of prevention;

(e) the economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(f) the standards of prevention which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

Article 13

Procedures in the absence of notification

1. If a State has reasonable grounds to believe that an activity planned or carried out in the territory or otherwise under the jurisdiction or control of another State may have a risk of causing significant transboundary harm, the former State may request the latter to apply the provision of article 10. The request shall be accompanied by a documented explanation setting forth its grounds.

2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 10, it shall so inform the other State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations in the manner indicated in article 11.

3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a period of six months unless otherwise agreed.

Article 14

Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all available information relevant to preventing, or minimizing the risk of, significant transboundary harm.

Article 15

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Article 16

Non-discrimination

Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of activities within the scope of the present draft articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

Article 17

Settlement of disputes

1. Any dispute concerning the interpretation or application of the present draft articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties, including submission of the dispute to mediation, conciliation, arbitration or judicial settlement.

2. Failing an agreement in this regard within a period of six months, the parties concerned shall, at the request of one of them, have recourse to the appointment of an independent and impartial fact-finding commission. The report of the commission shall be considered by the parties in good faith.

2. Text of the draft articles with commentaries thereto

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING FROM ACTS NOT PROHIBITED BY INTERNATIONAL LAW

(PREVENTION OF TRANSBOUNDARY DAMAGE FROM HAZARDOUS ACTIVITIES)

General commentary

(1) The draft articles deal with the concept of prevention in the context of authorization and regulation of hazardous activities which pose a significant risk of transboundary harm. Prevention in this sense, as a procedure or as a duty, deals with the phase prior to the situation where significant harm or damage has actually occurred, requiring States concerned to invoke remedial or compensatory measures, which often involve issues concerning liability.

(2) The concept of prevention has assumed great significance and topicality. The emphasis upon the duty to prevent as opposed to the obligation to repair, remedy or compensate has several important aspects. Prevention should be a preferred policy because compensation in case of harm often cannot restore the situation prevailing prior to the event or accident. Discharge of the duty of prevention or due diligence is all the more required as knowledge regarding the operation of hazardous activities, materials used and the process of managing them and the risks involved is steadily growing. From a legal point of view, the enhanced ability to trace the chain of causation, i.e. the physical link between the cause (activity) and the effect (harm), and even the several intermediate links in such a chain of causation, makes it also imperative for operators of hazardous activities to take all steps necessary to prevent harm. In any event, prevention as a policy is better than cure.

(3) Prevention of transboundary harm arising from hazardous activities is an objective well emphasized by principle 2 of the Rio Declaration[10] and confirmed by the International Court of Justice in its advisory opinion of 8 July 1996 on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*[11] as now forming part of the corpus of international law.

(4) The issue of prevention, therefore, has rightly been stressed by the Experts Group on Environmental Law of the World Commission on Environment and Development. Article 10 recommended by the Group in respect of transboundary natural resources and environmental interferences thus reads: "States shall, without prejudice to the principles laid down in articles 11 and 12, prevent or abate any transboundary environmental interference or a significant risk thereof which causes substantial harm - i.e. harm which is not minor or insignificant."[12] It must be further noted that the well-established principle of prevention was highlighted in the arbitral award in the *Trail Smelter* case

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[10] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

[11] Advisory opinion of 8 July 1996, *I.C.J. Reports 1996*, p. 15, para. 29; see also A/51/218, annex.

[12] *Environmental Protection and Sustainable Development - Legal Principles and Recommendations*, adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development (Graham and Trotman/Martinus Nijhoff, 1986), p. 75. It was also noted that the duty not to cause substantial harm could be deduced from the non-treaty-based practice of States, and from the statements made by States individually and/or collectively. See J. G. Lammers, *Pollution of International Watercourses* (Martinus Nijhoff, The Hague, 1984), pp. 346-347, 374-376.

and was reiterated not only in principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration but also in General Assembly resolution 2995 (XXVII) of 15 December 1972 on cooperation between States in the field of the environment. This principle is also reflected in principle 3 of the 1978 draft United Nations Environment Programme (UNEP) Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, which provided that States must "avoid to the maximum extent possible and ... reduce to the minimum extent possible the adverse environmental effects beyond its jurisdiction of the utilization of a shared natural resource so as to protect the environment, in particular when such utilization might: (a) cause damage to the environment which could have repercussions on the utilization of the resource by another sharing State; (b) threaten the conservation of a shared renewable resource; (c) endanger the health of the population of another State."[13]

(5) Prevention of transboundary harm to the environment, persons and property has been accepted as an important principle in many multilateral treaties concerning protection of the environment, nuclear accidents, space objects, international watercourses, management of hazardous wastes and prevention of marine pollution. It has also been accepted in several conventions concluded by the Economic Commission for Europe (ECE) such as the 1979 Convention on Long-range Transboundary Air Pollution; the 1991 Convention on Environmental Impact Assessment in a Transboundary Context; the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes; and the 1992 Convention on the Transboundary Effects of Industrial Accidents.

Article 1

Activities to which the present draft articles apply

> The present draft articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

Commentary

(1) Article 1 limits the scope of the articles to activities not prohibited by international law and which involve a risk of causing significant transboundary harm through their physical consequences. Subparagraph (c) of article 2 further

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[13] International Legal Materials, vol. 17 (1978), p. 1098. For a mention of other sources where the principle of prevention is reflected, see Environmental Protection and Sustainable Development - Legal Principles and Recommendations, op. cit., pp. 75-80.

limits the scope of articles to those activities carried out in the territory or otherwise under the jurisdiction or control of a State. Since the articles are of a general and residual character, no attempt has been made at this stage to spell out the activities to which they apply. The Commission had different reasons for supporting this conclusion. According to some members, any list of activities would be likely to be under-inclusive, as well as having to be changed from time to time in the light of changing technology. Moreover - leaving to one side certain ultrahazardous activities which are mostly the subject of special regulation, e.g. in the nuclear field or in the context of activities in outer space - the risk that flows from an activity is primarily a function of the particular application, the specific context and the manner of operation. A generic list could not capture these elements. Other members of the Commission are more receptive to the idea of a list of activities. But they take the view that it would be premature at this stage to draw up a list, until the form, scope and content of the articles are more firmly settled. In addition, in their view, the drawing up of such a list is more appropriately done by the relevant technical experts in the context of a diplomatic conference considering the adoption of the articles as a convention.

(2) The definition of scope of activities referred to in article 1 now contains four criteria.

(3) The first criterion refers back to the title of the topic, namely that the articles apply to "activities not prohibited by international law", whether such a prohibition arises in relation to the conduct of the activity or by reason of its prohibited effects.

(4) The second criterion, found in the definition of the State of origin in article 2, subparagraph (d), is that the activities to which preventive measures are applicable are "carried out in the territory or otherwise under the jurisdiction or control of a State". Three concepts are used in this criterion: "territory", "jurisdiction" and "control". Even though the expression "jurisdiction or control of a State" is a more commonly used formula in some instruments[11] the Commission finds it useful to mention also the concept of

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[11] See, for example, principle 21 of the Stockholm Declaration, Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and Corr.), chap. I; the United Nations Convention on the Law of the Sea of 10 December 1982, Official Records of the Third United Nations Conference on the Law of the Sea, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122, article 194, paragraph 2; principle 2 of the Rio Declaration (see note 10 above), and article 3 of the United Nations Convention on Biological Diversity of 5 June 1992 (see UNEP, Convention on Biological Diversity (Environmental Law and Institutions Activity Centre), June 1992).

"territory" in order to emphasize the importance of the territorial link, when such a link exists, between activities under these articles and a State.

(5) The use of the term "territory" in article 1 stems from concerns about a possible uncertainty in contemporary international law as to the extent to which a State may exercise extraterritorial jurisdiction in respect of certain activities. It is the view of the Commission that, for the purposes of these articles, territorial jurisdiction is the dominant criterion. Consequently, when an activity occurs within the territory of a State, that State must comply with the preventive measures obligations. "Territory" is, therefore, taken as conclusive evidence of jurisdiction. Consequently, in cases of competing jurisdictions over an activity covered by these articles, the territorially based jurisdiction prevails. The Commission, however, is mindful of situations where a State, under international law, has to yield jurisdiction within its territory to another State. The prime example of such a situation is innocent passage of a foreign ship through the territorial sea. In such situations, if the activity leading to significant transboundary harm emanates from the foreign ship, the flag State and not the territorial State must comply with the provisions of the present articles.

(6) The concept of "territory" for the purposes of these articles is narrow and therefore the concepts of "jurisdiction" and "control" are also used. The expression "jurisdiction" of a State is intended to cover, in addition to the activities being undertaken within the territory of a State, activities over which, under international law, a State is authorized to exercise its competence and authority. The Commission is aware that questions involving the determination of jurisdiction are complex and sometimes constitute the core of a dispute. This article certainly does not presume to resolve all the questions of conflicts of jurisdiction.

(7) Sometimes, because of the location of the activity, there is no territorial link between a State and the activity such as, for example, activities taking place in outer space or on the high seas. The most common example is the jurisdiction of the flag State over a ship. The 1958 Geneva Conventions on the Law of the Sea and the 1982 United Nations Convention on the Law of the Sea have covered many jurisdictional capacities of the flag State.

(8) Activities may also be undertaken in places where more than one State is authorized, under international law, to exercise particular jurisdictions that are not incompatible. The most common areas where there are functional mixed jurisdictions are the navigation and passage through the territorial sea, contiguous zone and exclusive economic zones. In such circumstance, the State

which is authorized to exercise jurisdiction over the activity covered by this topic must, of course, comply with the provisions of these articles.

(9) In cases of concurrent jurisdiction by more than one State over the activities covered by these articles, States shall individually and, when appropriate, jointly comply with the provisions of these articles.

(10) The function of the concept of "control" in international law is to attach certain legal consequences to a State whose jurisdiction over certain activities or events is not recognized by international law; it covers situations in which a State is exercising de facto jurisdiction, even though it lacks jurisdiction de jure, such as in cases of intervention, occupation and unlawful annexation which have not been recognized in international law. Reference may be made, in this respect, to the advisory opinion by the International Court of Justice in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) case.[15] In that case, the Court, after holding South Africa responsible for having created and maintained a situation which the Court declared illegal and finding South Africa under an obligation to withdraw its administration from Namibia, nevertheless attached certain legal consequences to the de facto control of South Africa over Namibia. The Court held:

> "The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."[16]

(11) The concept of control may also be used in cases of intervention to attribute certain obligations to a State which exercises control as opposed to jurisdiction. Intervention here refers to a short-time effective control by a State over events or activities which are under the jurisdiction of another State. It is the view of the Commission that in such cases, if the jurisdictional State demonstrates that it had been effectively ousted from the exercise of its jurisdiction over the activities covered by these articles, the controlling State would be held responsible to comply with the obligations imposed by these articles.

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[15] I.C.J. Reports 1971, p. 16.

[16] Ibid., para. 118.

(12) The third criterion is that activities covered in these articles must involve a "risk of causing significant transboundary harm". The term is defined in article 2 (see the commentary to article 2). The words "transboundary harm" are intended to exclude activities which cause harm only in the territory of the State within which the activity is undertaken without any harm to any other State. For discussion of the term "significant", see the commentary to article 2.

(13) As to the element of "risk", this is by definition concerned with future possibilities, and thus implies some element of assessment or appreciation of risk. The mere fact that harm eventually results from an activity does not mean that the activity involved a risk, if no properly informed observer was or could have been aware of that risk at the time the activity was carried out. On the other hand, an activity may involve a risk of causing significant transboundary harm even though those responsible for carrying out the activity underestimated the risk or were even unaware of it. The notion of risk is thus to be taken objectively, as denoting an appreciation of possible harm resulting from an activity which a properly informed observer had or ought to have had.

(14) In this context, it should be stressed that these articles as a whole have a continuing operation and effect, i.e., unless otherwise stated, they apply to activities as carried out from time to time. Thus it is possible that an activity which in its inception did not involve any risk (in the sense explained in paragraph (13)), might come to do so as a result of some event or development. For example, a perfectly safe reservoir may become dangerous as a result of an earthquake, in which case the continued operation of the reservoir would be an activity involving risk. Or developments in scientific knowledge might reveal an inherent weakness in a structure or materials which carry a risk of failure or collapse, in which case again the present articles might come to apply to the activity concerned in accordance with their terms.

(15) The fourth criterion is that the significant transboundary harm must have been caused by the "physical consequences" of such activities. It was agreed by the Commission that in order to bring this topic within a manageable scope, it should exclude transboundary harm which may be caused by State policies in monetary, socio-economic or similar fields. The Commission feels that the most effective way of limiting the scope of these articles is by requiring that these activities should have transboundary physical consequences which, in turn, result in significant harm.

(16) The physical link must connect the activity with its transboundary effects. This implies a connection of a very specific type - a consequence which does or may arise out of the very nature of the activity or situation in question, in

response to a natural law. That implies that the activities covered in these articles must themselves have a physical quality, and the consequences must flow from that quality, not from an intervening policy decision. Thus, the stockpiling of weapons does not entail the consequence that the weapons stockpiled will be put to a belligerent use. Yet this stockpiling may be characterized as an activity which, because of the explosive or incendiary properties of the materials stored, entails an inherent risk of disastrous misadventure.

Article 2

Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "harm" includes harm caused to persons, property or the environment;

(c) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(d) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft article 1 are carried out;

(e) "State likely to be affected" means the State in the territory of which the significant transboundary harm is likely to occur or which has jurisdiction or control over any other place where such harm is likely to occur.

Commentary

(1) Subparagraph (a) defines the concept of "risk of causing significant transboundary harm" as encompassing a low probability of causing disastrous harm and a high probability of causing other significant harm. The Commission feels that instead of defining separately the concept of "risk" and then "harm", it is more appropriate to define the expression of "risk of causing significant transboundary harm" because of the interrelationship between "risk" and "harm" and the relationship between them and the adjective "significant".

(2) For the purposes of these articles, "risk of causing significant transboundary harm" refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It is, therefore, the combined effect of "risk" and "harm" which sets the threshold. In this respect the Commission drew inspiration from the Code of Conduct on

Accidental Pollution of Transboundary Inland Waters,[17] adopted by the Economic Commission for Europe in 1990. Under article I, paragraph (f), of the Code of Conduct, "'risk' means the combined effect of the probability of occurrence of an undesirable event and its magnitude". It is the view of the Commission that a definition based on the combined effect of "risk" and "harm" is more appropriate for these articles, and that the combined effect should reach a level that is deemed significant. The prevailing view in the Commission is that the obligations of prevention imposed on States should be not only reasonable but also sufficiently limited so as not to impose such obligations in respect of virtually any activity, for the activities under discussion are not prohibited by international law. The purpose is to strike a balance between the interests of the States concerned.

(3) The definition in the preceding paragraph allows for a spectrum of relationships between "risk" and "harm", all of which would reach the level of "significant". The definition identifies two poles within which the activities under these articles fall. One pole is where there is a low probability of causing disastrous harm. This is normally the characteristic of ultrahazardous activities. The other pole is where there is a high probability of causing other significant harm. This includes activities which have a high probability of causing harm which, while not disastrous, is still significant. But it would exclude activities where there is a very low probability of causing significant transboundary harm. The word "encompasses" in the second line is intended to highlight the intention that the definition is providing a spectrum within which the activities under these articles will fall.

(4) As regards the meaning of the word "significant", the Commission is aware that it is not without ambiguity and that a determination has to be made in each specific case. It involves more factual considerations than legal determination. It is to be understood that "significant" is something more than "detectable" but need not be at the level of "serious" or "substantial". The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards.

(5) The ecological unity of the planet does not correspond to political boundaries. In carrying out lawful activities within their own territories States have impacts on each other. These mutual impacts, so long as they have not reached the level of "significant", are considered tolerable. Considering

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[17] E/ECE/1225-ECE/ENVWA/16.

that the obligations imposed on States by these articles deal with activities that are not prohibited by international law, the threshold of intolerance of harm cannot be placed below "significant".

(6) The idea of a threshold is reflected in the Trail Smelter award, which used the words "serious consequences",[18] as well as the tribunal in the Lake Lanoux arbitration, which relied on the concept "seriously" (gravement).[19] A number of conventions have also used "significant", "serious" or "substantial" as the threshold.[20] "Significant" has also been used in other legal instruments and domestic law.[21]

(7) The Commission is also of the view that the term "significant", while determined by factual and objective criteria, also involves a value determination which depends on the circumstances of a particular case and the period in which such determination is made. For instance, a particular

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[18] Trail Smelter case; United Nations, Reports of International Arbitral Awards, vol. 3, p. 1965.

[19] Lake Lanoux Arbitration (France-Spain), ibid., vol. 12, p. 281.

[20] See, for example, article 4 (2) of the Convention on the Regulation of Antarctic Mineral Resource Activities of 2 June 1988, International Legal Materials, vol. 27 (1988), p. 868; articles 2 (1) and (2) of the Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991 (E/ECE/1250), reprinted in International Legal Materials, vol. 30 (1991), p. 800; article I (b) of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters (see note 17 above).

[21] See, for example, paragraphs 1 and 2 of General Assembly resolution 2995 (XXVII) of 15 December 1972 concerning cooperation between States in the field of the environment; Recommendation of the Council of the Organization for Economic Cooperation and Development (OECD) on Principles concerning Transfrontier Pollution, 1974, para. 6, OECD, Non-Discrimination in Relation to Transfrontier Pollution: Leading OECD Documents, p. 35, reproduced also in International Legal Materials, vol. 14, p. 246; the Helsinki Rules on the Uses of the Waters of International Rivers, art. 10, International Law Association, Report of the Fifty-second Conference, Helsinki, 1966, p. 496; and article 5 of the draft Convention on industrial and agricultural uses of international rivers and lakes, prepared by the Inter-American Juridical Committee in 1965, Organization of American States, Rios y Lagos Internacionales, p. 132 (4th ed. 1971).

See also the 1980 Memorandum of Intent Concerning Transboundary Air Pollution between the United States and Canada, 32 U.S.T., p. 2541, T.I.A.S. No. 9856; and the 1983 Mexico-United States Agreement to Cooperate in the Solution of Environmental Problems in the Border Area, article 7, in International Legal Materials, vol. 22, p. 1025 (1983).

The United States has also used the word "significant" in its domestic law dealing with environmental issues. See the American Law Institute, Restatement of the Law, Section 601, Reporter's Note 3, pp. 111-112.

deprivation at a particular time might not be considered "significant" because at that specific time scientific knowledge or human appreciation for a particular resource had not reached a point at which much value was ascribed to that particular resource. But some time later that view might change and the same harm might then be considered "significant".

(8) Subparagraph (b) is self-explanatory in that "harm" for the purpose of the present draft articles would cover harm caused to persons, property or the environment.

(9) Subparagraph (c) defines "transboundary harm" as meaning harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border. This definition includes, in addition to a typical scenario of an activity within a State with injurious effects on another State, activities conducted under the jurisdiction or control of a State, for example, on the high seas, with effects on the territory of another State or in places under its jurisdiction or control. It includes, for example, injurious impacts on ships or platforms of other States on the high seas as well. It will also include activities conducted in the territory of a State with injurious consequences on, for example, the ships or platforms of another State on the high seas. The Commission cannot forecast all the possible future forms of "transboundary harm". However, it makes clear that the intention is to be able to draw a line and clearly distinguish a State to which an activity covered by these articles is attributable from a State which has suffered the injurious impact. Those separating boundaries are the territorial boundaries, jurisdictional boundaries and control boundaries.

(10) In subparagraph (d), the term "State of origin" is introduced to refer to the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out (see commentary to article 1, paras. (4)-(11).

(11) In subparagraph (e), the term "State likely to be affected" is defined to mean the State on whose territory or in other places under whose jurisdiction or control significant transboundary harm is likely to occur. There may be more than one such State likely to be affected in relation to any given activity.

Article 3

Prevention

States shall take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm.

Commentary

(1) Article 3 is based on the fundamental principle sic utere tuo ut alienum non laedas, which is reflected in principle 21 of the Stockholm Declaration,[22] reading:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own natural resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

(2) However, the limitations on the freedom of States reflected in principle 21 are made more specific in article 3 and subsequent articles.

(3) This article, together with article 4, provides the basic foundation for the articles on prevention. The articles set out the more specific obligations of States to prevent, or to minimize the risk of, significant transboundary harm. The present article is in the nature of a statement of principle. It provides that States shall take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm. The word "measures" refers to all those specific actions and steps that are specified in the articles on prevention and minimization of transboundary harm.

(4) As a general principle, the obligation in article 3 to prevent or minimize the risk applies only to activities which involve a risk of causing significant transboundary harm, as those terms are defined in article 2. In general, in the context of prevention, a State does not bear the risk of unforeseeable consequences to other States of activities not prohibited by international law which are carried on its territory or under its jurisdiction or control. On the other hand the obligation to "take appropriate measures to prevent, or to minimize the risk of", harm cannot be confined to activities which are already properly appreciated as involving such a risk. The obligation extends to taking appropriate measures to identify activities which involve such a risk, and this obligation is of a continuing character.

(5) This article, then, sets up the principle of prevention that concerns every State in relation to activities covered by article 1. The modalities whereby the State of origin may discharge the obligations of prevention which have been established include, for example, legislative, administrative or other action necessary for enforcing the laws, administrative decisions and policies which the State has adopted. (See article 5 and the commentary thereto.)

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[22] See note 14 above.

(6) The obligation of States to take preventive or minimization measures is one of due diligence, requiring States to take certain unilateral measures to prevent, or to minimize a risk of, significant transboundary harm. The obligation imposed by this article is not an obligation of result. It is the conduct of a State that will determine whether the State has complied with its obligation under the present articles.

(7) An obligation of due diligence as the standard basis for the protection of the environment from harm can be deduced from a number of international conventions[23] as well as from the resolutions and reports of international conferences and organizations.[24] The obligation of due diligence was discussed in a dispute which arose in 1986 between Germany and Switzerland relating to the pollution of the Rhine by Sandoz; the Swiss Government acknowledged responsibility for lack of due diligence in preventing the accident through adequate regulation of its pharmaceutical industries.[25]

(8) In the Alabama case (United States of America v. United Kingdom of Great Britain and Northern Ireland), the Tribunal examined two different definitions of due diligence submitted by the parties. The United States defined due diligence as:

> "[A] diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter

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[23] See, for example, article 194, paragraph 1, of the United Nations Convention on the Law of the Sea (see note 14 above); articles I, II and VII (2) of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, International Legal Materials, vol. 11 (1972), p. 1294; article 2 of the Vienna Convention for the Protection of the Ozone Layer, ibid., vol. 26, p. 1529; article 7, paragraph 5, of the Convention on the Regulation of Antarctic Mineral Resources Activities (see note 20 above); article 2, paragraph 1, of the Convention on Environmental Impact Assessment in a Transboundary Context, ibid.; and article 2, paragraph 1, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, International Legal Materials, vol. 31 (1992), p. 1312.

[24] See principle 21 of the World Charter for Nature, General Assembly resolution 37/7 of 28 October 1982; principle VI of the Draft Principles relating to weather modification prepared by the World Health Organization (WHO) and the United Nations Environment Programme (UNEP), in Digest of United States Practice in International Law, 1978, p. 1205.

[25] See The New York Times, 11 November 1986, p. A 1; 12 November 1986, p. A 8; 13 November 1986, p. A 3. See also Alexander Kiss, "Tchernobale" ou la pollution accidentelle du Rhin par les produits chimiques, in Annuaire français de droit international, vol. 33, 1987, pp. 719-727.

designing men from committing acts of war upon the soil of the neutral against its will".[26]

(9) The United Kingdom defined due diligence as "such care as Governments ordinarily employ in their domestic concerns".[27] The tribunal seemed to have been persuaded by the broader definition of the standard of due diligence presented by the United States and expressed concern about the "national standard" of due diligence presented by the United Kingdom. The tribunal stated that "[the] British case seemed also to narrow the international duties of a Government to the exercise of the restraining powers conferred upon it by municipal law, and to overlook the obligation of the neutral to amend its laws when they were insufficient".[28]

(10) The extent and the standard of the obligation of due diligence was also elaborated on by Lord Atkin in the case of Donoghue v. Stevenson as follows:

> "The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question 'who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be: persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called into question."[29]

(11) In the context of the present articles, due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them. Thus States are under an obligation to take unilateral measures to prevent, or to minimize the risk of, significant transboundary harm by activities within the scope of article 1. Such measures include, first, formulating policies designed to prevent or to minimize the risk of transboundary harm and, second, implementing those

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[26] The Geneva Arbitration (The Alabama case) in J. B. Moore, History and digest of the International Arbitrations to which the United States has been a Party, vol. I, 1898, pp. 572-573.

[27] Ibid., p. 612.

[28] Ibid., p. 613.

[29] [1932] A.C., p. 580 (H.L.(Sc)).

policies. Such policies are expressed in legislation and administrative regulations and implemented through various enforcement mechanisms.

(12) The Commission believes that the standard of due diligence against which the conduct of a State should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. For example, activities which may be considered ultra-hazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location; special climate conditions; materials used in the activity; and whether the conclusions drawn from the application of these factors in a specific case are reasonable, are among the factors to be considered in determining the due diligence requirement in each instance. The Commission also believes that what would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time may not be considered as such at some point in the future. Hence, due diligence in ensuring safety requires a State to keep abreast of technological changes and scientific developments.

(13) The Commission takes note of principle 11 of the Rio Declaration on Environment and Development which states:

> "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries."[30]

(14) Similar language is found in principle 23 of the Stockholm Declaration. That principle, however, specifies that such domestic standards are "[w]ithout prejudice to such criteria as may be agreed upon by the international community".[31] It is the view of the Commission that the economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence. But a State's economic level cannot be used to discharge a State from its obligation under the present articles.

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[30] See note 10 above.

[31] See note 14 above.

(15) The obligation of the State is, first, to attempt to design policies and to implement them with the aim of preventing significant transboundary harm. If that is not possible, then the obligation is to attempt to minimize the risk of such harm. In the view of the Commission, the word 'minimize' should be understood in this context as meaning to pursue the aim of reducing to the lowest point the possibility of harm.

(16) Article 3 imposes on the State a duty to take all necessary measures to prevent, or to minimize the risk of causing, significant transboundary harm. This could involve, inter alia, taking such measures as are appropriate by way of abundant caution, even if full scientific certainty does not exist, to avoid or prevent serious or irreversible damage. This is well articulated in principle 15 of the Rio Declaration and is subject to the capacity of States concerned. It is realized that a more optimum and efficient implementation of the duty of prevention would require upgrading the input of technology in the activity as well as the allocation of adequate financial and manpower resources with necessary training for the management and monitoring of the activity.

(17) The operator of the activity is expected to bear the costs of prevention to the extent that he is responsible for the operation. The State of origin is also expected to undertake the necessary expenditure to put in place the administrative, financial and monitoring mechanisms referred to in article 5.

(18) The Commission notes that States are engaged in continuously evolving mutually beneficial schemes in the areas of capacity-building, transfer of technology and financial resources. Such efforts are recognized to be in the common interest of all States in developing uniform international standards regulating and implementing the duty of prevention.

Article 4

Cooperation

> States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more international organizations in preventing, or in minimizing the risk of, significant transboundary harm.

Commentary

(1) The principle of cooperation between States is essential in designing and implementing effective policies to prevent, or to minimize the risk of causing, significant transboundary harm. The requirement of cooperation of States extends to all phases of planning and of implementation. Principle 24 of the Stockholm Declaration and principle 7 of the Rio Declaration recognize cooperation as an essential element in any effective planning for the protection of the environment. More specific forms of cooperation have been stipulated in

subsequent articles. They envisage the participation of the State likely to be affected, which is indispensable to enhance the effectiveness of any preventive action. The latter State may know better than anybody else which features of the activity in question may be more damaging to it, or which zones of its territory close to the border may be more affected by the transboundary effects of the activity, such as a specially vulnerable ecosystem, etc.

(2) The article requires States concerned to cooperate in good faith. Paragraph 2 of Article 2 of the Charter of the United Nations provides that all Members "shall fulfil in good faith the obligations assumed by them in accordance with the present Charter". The Vienna Convention on the Law of Treaties and the Convention on Succession of States in Respect of Treaties declare in their preambles that the principle of good faith is universally recognized. In addition, article 26 and article 31, paragraph 1, of the Vienna Convention on the Law of Treaties acknowledge the essential place of this principle in the structure of treaties. The decision of the International Court of Justice in the Nuclear Tests case touches upon the scope of the application of good faith. In that case, the Court proclaimed that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith".[32] This dictum of the Court implies that good faith applies also to unilateral acts.[33] Indeed the principle of good faith covers "the entire structure of international relations".[34]

(3) The arbitration tribunal established in 1985 between Canada and France on disputes concerning filtering with the Gulf of St. Lawrence La Bretagne, held that the principle of good faith was among the elements that afforded a sufficient guarantee against any risk of a party exercising its rights abusively.[35]

(4) The words "States concerned" refer to the State of origin and the State or States likely to be affected. While other States in a position to contribute to the goals of these articles are encouraged to cooperate, they have no legal obligation to do so.

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[32] Nuclear Tests case (Australia v. France), Judgment of 20 December 1974, I.C.J. Reports 1974, p. 268.

[33] See M. Virally, review Essay of E. Zoller, La bonne foi en droit international public, 1977, in Am. J. Int'l L., vol. 77, p. 130.

[34] See R. Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey", Am. J. Int'l L., vol. 65, p. 734.

[35] International Law Reports, vol. 82, p. 614.

(5) The article provides that States shall as necessary seek the assistance of one or more international organization in performing their preventive obligations as set out in these articles. States shall do so only when it is deemed necessary. The words as necessary are intended to take account of a number of possibilities, including those indicated in paragraphs (6) to (9) below.

(6) First, assistance from international organizations may not be appropriate or necessary in every case involving the prevention, or minimization of the risk of, transboundary harm. For example, the State of origin or the State likely to be affected may, themselves, be technologically advanced and have as much or even more technical capability than international organizations to prevent, or to minimize the risk of, significant transboundary harm. Obviously, in such cases, there is no obligation to seek assistance from international organizations.

(7) Second, the term "international organization" is intended to refer to organizations that are relevant and in a position to assist in such matters. Even with the increasing number of international organizations, it cannot be assumed that there will necessarily be an international organization with the capabilities necessary for a particular instance.

(8) Third, even if there are relevant international organizations, their constitutions may bar them from responding to such requests from States. For example, some organizations may be required (or permitted) to respond to requests for assistance only from their member States, or they may labour under other constitutional impediments. Obviously, the article does not purport to create any obligation for international organizations to respond to requests for assistance under this article.

(9) Fourth, requests for assistance from international organizations may be made by one or more States concerned. The principle of cooperation means that it is preferable that such requests be made by all States concerned. The fact, however, that all States concerned do not seek necessary assistance does not discharge the obligation of individual States to seek assistance. Of course, the response and type of involvement of an international organization in cases in which the request has been lodged by only one State will depend on the nature of the request, the type of assistance involved, the place where the international organization would have to perform such assistance, etc.

Article 5

Implementation

> States shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present draft articles.

Commentary

(1) This article states what might be thought to be the obvious, viz., that by virtue of becoming a party to the present articles, States would be required to take the necessary measures of implementation, whether of a legislative, administrative or other character. Article 5 has been included here to emphasize the continuing character of the articles, which require action to be taken from time to time to prevent, or to minimize the risk of, transboundary harm arising from activities to which the articles apply.[36]

(2) The measures referred to in this article include, for example, hearings to be granted to persons concerned and the establishment of quasi-judicial procedures. The use of the term "other action" is intended to cover the variety of ways and means by which States could implement the present draft articles. Article 5 mentions some measures expressly only in order to give guidance to States; it is left entirely up to them what measures to adopt. Reference is made to "suitable monitoring mechanisms" in order to highlight the measures of inspection which States generally adopt in respect of hazardous activities.

(3) To say that States must take the necessary measures does not mean that they must themselves get involved in operational issues relating to the activities to which article 1 applies. Where these activities are conducted by private persons or enterprises, the obligation of the State is limited to establishing the appropriate regulatory framework and applying it in accordance with these draft articles. The application of that regulatory framework in the given case will then be a matter of ordinary administration or, in the case of disputes, for the relevant courts or tribunals, aided by the principle of non-discrimination contained in article 16.

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[36] This article is similar to paragraph 2 of article 2 of the Convention on Environmental Impact Assessment in a Transboundary Context, which reads:

> "Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in appendix II" (see note 20 above).

Article 6

Relationship to other rules of international law

Obligations arising from the present draft articles are without prejudice to any other obligations incurred by States under relevant treaties or rules of customary international law.

Commentary

(1) It has already been stressed that the present draft articles apply only to activities not prohibited by international law, whether such a prohibition arises in relation to the conduct of the activity or by reason of its prohibited effects. The present draft articles are residual in their operation. They apply only in situations where no more specific international rule or regime governs.

(2) Thus article 6 intends to make it as clear as may be that the present draft articles are without prejudice to the existence, operation or effect of any other obligations of States under international law relating to an act or omission to which these draft articles might otherwise, i.e., in the absence of such an obligation, be thought to apply. It follows that no inference is to be drawn from the fact that an activity falls within the apparent scope of these draft articles, as to the existence or non-existence of any other rule of international law, including any other primary rule, as to the activity in question or its actual or potential transboundary effects. The reference in article 6 to any other obligations of States covers both treaty obligations and obligations under customary international law. It is equally intended to extend both to rules having a particular application, whether to a given region or a specified activity, and to rules which are universal or general in scope. The background character of the present draft articles is thus further emphasized.

Article 7

Authorization

1. The prior authorization of a State is required for activities within the scope of the present draft articles carried out in its territory or otherwise under its jurisdiction or control as well as for any major change in an activity so authorized. Such authorization shall also be required in case a change is planned which may transform an activity into one falling within the scope of the present draft articles.

2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present draft articles.

3. In case of a failure to conform to the requirements of the authorization, the authorizing State shall take such actions as appropriate, including where necessary terminating the authorization.

Commentary

(1) This article sets forth the fundamental principle that the prior authorization of a State is required for activities which involve a risk of causing significant transboundary harm undertaken in their territory or otherwise under their jurisdiction or control. The word "authorization" means granting permission by governmental authorities to conduct an activity covered by these articles. States are free to choose the form of such authorization.

(2) It is the view of the Commission that the requirement of authorization obliges a State to ascertain whether activities with a possible risk of significant transboundary harm are taking place in its territory or otherwise under its jurisdiction or control and that the State should take the measures indicated in these articles. This article requires the State to take a responsible and active role in regulating activities taking place in their territory or under their jurisdiction or control with possible significant transboundary harm. The Commission notes, in this respect, that the Tribunal in the Trail Smelter arbitration held that Canada had "the duty ... to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined".[37] The Tribunal held that, in particular, "the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington".[38] In the view of the Commission, article 7 is compatible with this requirement.

(3) The International Court of Justice in the Corfu Channel case held that a State has an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States".[39]

(4) The words "in its territory or otherwise under its jurisdiction or control" are taken from article 2. The expression "activities within the scope of the present articles" introduces all the requirements specified in article 1 for an activity to fall within the scope of these articles.

(5) As reflected at the end of the first sentence of paragraph 1 of article 7, prior authorization is also required for a major change planned in an activity already within the scope of article 1 where that change may increase the risk or alter the nature or the scope of the risk. The second sentence of paragraph 1 contemplates situations where a change is proposed in the conduct of an activity

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[37] Op. cit. (see note 18 above), pp. 1965-1966.

[38] Ibid., p. 1966.

[39] Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949, p. 4, at p. 22.

that is otherwise innocuous, where the change would transform that activity into one which involves a risk of causing significant transboundary harm. The implementation of such a change would also require State authorization.

(6) Paragraph 2 of article 7 emphasizes that the requirement of authorization should be made applicable to all the pre-existing activities falling within the scope of the present articles, once a State adopts the regime contained in these articles. The Commission is aware that it might be unreasonable to require States when they assume the obligations under these articles to apply them immediately in respect of existing activities. A further period of time might be needed in that case for the operator of the activity to comply with the authorization requirements. The Commission is of the view that the decision as to whether the activity should be stopped pending authorization or should continue while the operator goes through the process of obtaining authorization should be left to the State of origin. In case the authorization is denied by the State of origin, it is assumed that the State of origin will stop the activity.

(7) The adjustment envisaged in paragraph 2 generally occurs whenever new legislative and administrative requirements are put in place because of safety standards or new international standards or obligations which the State has to enforce. However, some members felt that this issue should be addressed in a new article entitled "Continuous prevention". According to one view, the obligation to retrospective authorization imposed excessive burden on operators in the context of activities not prohibited by international law.

(8) Paragraph 3 of article 7 notes the consequences of the failure of an operator to comply with the requirement of authorization. The State of origin, which has the main responsibility to monitor these activities, is given the necessary flexibility to ensure that the operator complies with the requirements involved. Where appropriate, that State may terminate the authorization, and thus prohibit the activity from taking place altogether.

Article 8

Impact assessment

> Any decision in respect of the authorization of an activity within the scope of the present draft articles shall be based on an evaluation of the possible transboundary harm caused by that activity.

Commentary

(1) Under article 8, a State, before granting authorization to operators to undertake activities referred to in article 1, should ensure that an assessment is undertaken of the risk of the activity causing significant transboundary

harm. This assessment enables the State to determine the extent and the nature of the risk involved in an activity and consequently the type of preventive measures it should take. The Commission feels that as these articles are designed to have global application, they cannot be too detailed. They should contain only what is necessary for clarity.

(2) Although the impact assessment in the Trail Smelter case may not directly relate to liability for risk, it nevertheless emphasized the importance of an assessment of the consequences of an activity causing significant risk. The tribunal in that case indicated that the study undertaken by well-established and known scientists was "probably the most thorough [one] ever made of any area subject to atmospheric pollution by industrial smoke".[40]

(3) The requirement of article 8 is fully consonant with principle 17 of the Rio Declaration on Environment and Development, which provides also for impact assessment of activities that are likely to have a significant adverse impact on the environment:

> "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."[41]

Requirements of assessment of adverse effects of activities have been incorporated in various forms in many international agreements.[42] The most notable is the Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991 which is devoted entirely to the procedure to conduct and the substance of impact assessment.[43]

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[40] Op. cit. (see note 18 above), pp. 1973-1974.

[41] See note 10 above.

[42] See, for example, articles 205 and 206 of the United Nations Convention on the Law of the Sea (see note 14 above); article 4 of the Convention on the Regulation of Antarctic Mineral Resources Activities (see note 20 above); article 8 of the Protocol on Environmental Protection to the Antarctic Treaty of 4 October 1991, International Legal Materials, vol. 30, p. 1461; article 14 (1) (a) and (b) of the United Nations Convention on Biological Diversity of 5 June 1992 (see note 14 above); article 14 of the ASEAN Agreement on the Conservation of Nature and Natural Resources of 9 July 1985, UNEP, Selected Multilateral Treaties in the Field of Environment, vol. 2, p. 343; Noumea Convention for the Protection of the Natural Resources and Environment of the South-Pacific Region of 25 November 1986, International Legal Materials, vol. 26 (1986), p. 38; article XI of the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution of 24 April 1978, United Nations, Treaty Series, vol. 1140, p. 133; and the Jeddah Regional Convention for the Conservation of the Regional Environment of the Red Sea and Gulf of Aden of 14 February 1982, UNEP, op. cit., p. 144. In some treaties, the requirement of impact assessment is implied. For example, the two multilateral treaties regarding communication systems require their signatories to use their communications installations in ways that will not interfere with the facilities of other States parties. Article 10, paragraph 2, of the 1927 International Radiotelegraph Convention requires the parties to the Convention to operate

(4) The question of who should conduct the assessment is left to States. Such assessment is normally conducted by operators observing certain guidelines set by the States. These matters would have to be resolved by the States themselves through their domestic laws or applicable international instruments. However, it is presumed that a State will designate an authority, whether or not governmental, to evaluate the assessment on behalf of the Government and will accept responsibility for the conclusions reached by that authority.

(5) The article does not specify what the content of the risk assessment should be. Obviously the assessment of risk of an activity can only be meaningfully prepared if it relates the risk to the possible harm to which the risk could lead. Most existing international conventions and legal instruments do not specify the content of assessment. There are exceptions, such as the Convention on Environmental Impact Assessment in a Transboundary Context, which provides in detail the content of such assessment.[44] The 1981 study of the legal aspects

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stations in such a manner as not to interfere with the radioelectric communications of other contracting States or of persons authorized by those Governments. League of Nations, Treaty Series, vol. LXXXIV, p. 97. The 1936 International Convention concerning the Use of Broadcasting in the Cause of Peace prohibits the broadcasting to another State of material designed to incite the population to act in a manner incompatible with the internal order of security of that State. Ibid., vol. CLXXXVI, p. 301.

[43] See note 20 above.

[44] Article 4 of the Convention provides that the environmental impact assessment of a State party should contain, as a minimum, the information described in appendix II to the Convention. Appendix II lists nine items as follows:

"Content of the environmental impact assessment documentation

"Information to be included in the environmental impact assessment documentation shall, as a minimum, contain, in accordance with article 4:

(a) A description of the proposed activity and its purpose;

(b) A description, where appropriate, of reasonable alternatives (for example, location or technological) to the proposed activity and also the no-action alternative;

(c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;

(d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;

concerning the environment related to offshore mining and drilling within the limits of national jurisdiction, prepared by the Working Group of Experts on Environmental Law of UNEP,[45] also provides, in its conclusion No. 8, in detail for the content of assessment for offshore mining and drilling.

(6) The prevailing view in the Commission is to leave the specifics of what ought to be the content of assessment to the domestic laws of the State conducting such assessment. Some members, however, felt that it was desirable and necessary that the draft article should have elaborated on the elements of the environmental impact assessment for the guidance of States. For the purposes of article 8, however, such an assessment should contain an evaluation of the possible transboundary harmful impact of the activity. Under the terms of article 10, the State of origin will have to transmit the risk assessment to the States which might be suffering harm by that activity. In order for those States to evaluate the risk to which they might be exposed, they need to know what possible harmful effects that activity might have on them as well as the probabilities of the harm occurring.

(7) The assessment should include the effects of the activity not only on persons and property, but also on the environment of other States. The Commission is convinced of the necessity and the importance of the protection of the environment, independently of any harm to individual human beings or property.

(8) This article does not oblige the States to require risk assessment for any activity being undertaken within their territory or otherwise under their jurisdiction or control. Activities involving a risk of causing significant transboundary harm have some general characteristics which are identifiable and

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(e) A description of mitigation measures to keep adverse environmental impact to a minimum;

(f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;

(g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;

(h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and

(i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.)."

[45] See UNEP/GC.9/5/Add.5, annex III.

could provide some indication to States as to which activities might fall within the terms of these articles. For example, the type of the source of energy used in manufacturing, the location of the activity and its proximity to the border area, etc. could all give an indication of whether the activity might fall within the scope of these articles. There are certain substances that are listed in some conventions as dangerous or hazardous and their use in any activity may in itself be an indication that those activities might cause significant transboundary harm.[46] There are also certain conventions that list the activities that are presumed to be harmful and that might signal that those activities might fall within the scope of these articles.[47]

Article 9

Information to the public

> States shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present draft articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Commentary

(1) Article 9 requires States, whenever possible and by such means as are appropriate, to provide the public likely to be affected, whether their own or

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[46] For example, the 1974 Convention for the Prevention of Marine Pollution from Land-based Sources provides in article 4 an obligation for the parties to eliminate or restrict the pollution of the environment by certain substances and the list of those substances is annexed to the Convention, UNEP, Selected Multilateral Treaties in the Field of the Environment, Ref. Series 3, 1983, p. 430. Similarly, the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area provides a list of hazardous substances in annex I and of noxious substances and materials in annex II, deposits of which are either prohibited or strictly limited, [IMO 1] LDC.2/Circ. 303; see also the Protocol to the 1976 Convention for the Protection of the Mediterranean Sea against Pollution, ibid.; and the 1976 Convention for the Protection of the Rhine against Chemical Pollution, United Nations, Treaty Series, vol. 1124, p. 375.

[47] See, for example, annex I to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context, where a number of activities such as the crude oil refineries, thermal power stations, installations to produce enriched nuclear fuels, etc., are identified as possibly dangerous to the environment and requiring environmental impact assessment under the Convention (see note 20 above). Annex II to the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, where activities such as the installations or sites for the partial or complete disposal of solid, liquid or gaseous wastes by incineration on land or at sea, installations or sites for thermal degradation of solid, gaseous or liquid wastes under reduced oxygen supply, etc., have been identified as dangerous activities. This Convention also has a list of dangerous substances in annex I, European Treaty Series, No. 150.

that of other States, with information relating to the risk and harm that might result from an activity subject to authorization and to ascertain their views thereon. The article therefore requires States (a) to provide information to the public regarding the activity and the risk and the harm it involves, and (b) to ascertain the views of the public. It is, of course, clear that the purpose of providing information to the public is in order to allow its members to inform themselves and then to ascertain their views. Without that second step, the purpose of the article would be defeated.

(2) The content of the information to be provided to the public includes information about the activity itself as well as the nature and the scope of risk and harm that it entails. Such information is contained in the documents accompanying the notification which is effected in accordance with article 10 or in the assessment which may be carried out by the State likely to be affected under article 13.

(3) This article is inspired by new trends in international law, in general, and environmental law, in particular, of seeking to involve, in the decision-making processes, individuals whose lives, health, property and environment might be affected by providing them with a chance to present their views and be heard by those responsible for making the ultimate decisions.

(4) Principle 10 of the Rio Declaration on Environment and Development provides for public involvement in decision-making processes as follows:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."[48]

(5) A number of other recent international legal agreements dealing with environmental issues have required States to provide the public with information and to give it an opportunity to participate in decision-making processes. Article VII, paragraphs 1 and 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters is relevant in that context:

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[48] See note 10 above.

> "1. In order to promote informed decision-making by central, regional or local authorities in proceedings concerning accidental pollution of transboundary inland waters, countries should facilitate participation of the public likely to be affected in hearings and preliminary inquiries and the making of objections in respect of proposed decisions, as well as recourse to and standing in administrative and judicial proceedings.
>
> "2. Countries of incident should take all appropriate measures to provide physical and legal persons exposed to a significant risk of accidental pollution of transboundary inland waters with sufficient information to enable them to exercise the rights accorded to them by national law in accordance with the objectives of this Code."[49]

Article 16 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes;[50] article 3, paragraph 8, of the Convention on Environmental Impact Assessment in a Transboundary Context;[51] article 17 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area;[52] and article 6 of the United Nations Framework Convention on Climate Change[53] all provide for information to the public.

(6) There are many modalities for participation in decision-making processes. Reviewing data and information on the basis of which decisions will be based and having an opportunity to confirm or challenge the accuracy of the facts, the analysis and the policy considerations either through administrative tribunals, courts, or groups of concerned citizens is one way of participation in decision-making. In the view of the Commission, this form of public involvement enhances the efforts to prevent transboundary and environmental harm.

(7) The obligation contained in article 9 is circumscribed by the phrase "by such means as are appropriate", which is intended to leave the ways in which such information could be provided to the States, their domestic law requirements and the State policy as to, for example, whether such information should be provided through media, non-governmental organizations, public agencies, local authorities, etc. In the case of the public beyond a State's borders, information may be provided, as appropriate, through the good offices of the State concerned, if direct communication is not feasible or practical.

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[49] See note 17 above.

[50] See note 23 above.

[51] See note 20 above.

[52] See note 46 above.

[53] International Legal Materials, vol. 31 (1992), p. 851.

(8) Further, the State that might be affected, after receiving notification and information from the State of origin, shall, by such means as are appropriate, inform those parts of its own public likely to be affected before responding to the notification.

Article 10

Notification and information

> 1. If the assessment referred to in article 8 indicates a risk of causing significant transboundary harm, the State of origin shall, pending any decision on the authorization of the activity, provide the States likely to be affected with timely notification thereof and shall transmit to them the available technical and other relevant information on which the assessment is based.
>
> 2. The response from the States likely to be affected shall be provided within a reasonable time.

Commentary

(1) Article 10 deals with a situation in which the assessment undertaken by a State, in accordance with article 8, indicates that the activity planned does indeed pose a risk of causing significant transboundary harm. This article, together with articles 9, 11, 13 and 14, provides for a set of procedures essential to balancing the interests of all the States concerned by giving them a reasonable opportunity to find a way to undertake the activity with satisfactory and reasonable measures designed to prevent or minimize transboundary harm.

(2) Article 10 calls on a State to notify other States which are likely to be affected by the activity that is planned. The activities here include both those that are planned by the State itself and those planned by private entities. The requirement of notification is an indispensable part of any system designed to prevent or to minimize the risk of transboundary harm.

(3) The obligation to notify other States of the risk of significant harm to which they are exposed is reflected in the Corfu Channel case, where the International Court of Justice characterized the duty to warn as based on "elementary considerations of humanity".[54] This principle is recognized in the context of the use of international watercourses and in that context is embodied in a number of international agreements, decisions of international courts and tribunals, declarations and resolutions adopted by intergovernmental

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[54] Op. cit. (see note 39 above), p. 22.

organizations, conferences and meetings, and studies by intergovernmental and international non-governmental organizations.[55]

(4) In addition to the utilization of international watercourses, the principle of notification has also been recognized in respect of other activities with transboundary effects, for example, article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context[56] and articles 3 and 10 of the Convention on the Transboundary Effects of Industrial Accidents.[57] Principle 19 of the Rio Declaration on Environment and Development speaks of timely notification:

> "States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith."[58]

(5) The procedure for notification has been established by a number of OECD resolutions. For example, in respect of certain chemical substances, OECD resolution C(71)73 of 18 May 1971 stipulates that each member State is to receive notification prior to the proposed measures in each other member State regarding substances which have an adverse impact on man or the environment where such measures could have significant effects on the economics and trade of the other States.[59] OECD resolution C(74)224 of 14 November 1974 on the "Principles concerning transfrontier pollution" in its "Principle of information and consultation" requires notification and consultation prior to undertaking an activity which may create a risk of significant transboundary pollution.[60]

(6) The principle of notification is well established in the case of environmental emergencies. Principle 18 of the Rio Declaration on Environment

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[55] For treaties dealing with prior notification and exchange of information in respect of watercourses, see para. (6) of the commentary to article 12 "Notification concerning planned measures with possible adverse effects", of the draft articles on the law of the non-navigational uses of international watercourses, Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), chap. III.D, part III.

[56] Article 3 of the Convention provides for an elaborate system of notification (see note 20 above).

[57] International Legal Materials, vol. 31 (1992), p. 1333.

[58] See note 10 above.

[59] OECD, OECD and the Environment, 1986, p. 89, para. 4 of the annex.

[60] Ibid., p. 142.

and Development,[61] article 198 of the United Nations Convention on the Law of the Sea,[62] article 2 of the Convention on Early Notification of a Nuclear Accident,[63] article 14 (1) (d) and (3) of the United Nations Convention on Biological Diversity[64] and article 5 (1) (c) of the International Convention on Oil Pollution Preparedness, Response and Cooperation[65] all require notification.

(7) Where assessment reveals the risk of causing significant transboundary harm, in accordance with paragraph 1, the State which plans to undertake such activity has the obligation to notify the States which may be affected. The notification shall be accompanied by available technical information on which the assessment is based. The reference to "available" technical and other relevant information is intended to indicate that the obligation of the State of origin is limited to transmitting the technical and other information which was developed in relation to the activity. This information is generally revealed during the assessment of the activity in accordance with article 8. Paragraph 1 assumes that technical information resulting from the assessment includes not only what might be called raw data, namely fact sheets, statistics, etc., but also the analysis of the information which was used by the State of origin itself to make the determination regarding the risk of transboundary harm.

(8) States are free to decide how they wish to inform the States that are likely to be affected. As a general rule, it is assumed that States will directly contact the other States through diplomatic channels. In the absence of diplomatic relations, States may give notification to the other States through a third State.

(9) Paragraph 1 also addresses the situation where the State of origin, despite all its efforts and diligence, is unable to identify all the States which may be affected prior to authorizing the activity and only after the activity is undertaken gains that knowledge. In accordance with this paragraph, the State of origin, in such cases, is under the obligation to make such notification as soon as the information comes to its knowledge and it has had an opportunity, within a reasonable time, to determine that certain other States are likely to be affected by the activity.

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[61] See note 10 above.

[62] See note 14 above.

[63] International Legal Materials, vol. 25 (1986), p. 1369.

[64] See note 14 above.

[65] International Legal Materials, vol. 30 (1990), p. 735.

(10) Paragraph 2 addresses the need for the States concerned to respond within a reasonable time. The determination of what is a "reasonable time" depends on several factors. It is generally a period of time that should allow the States concerned to evaluate the data involved and arrive at their own conclusion. This is a requirement that is conditioned by cooperation and good faith.

Article 11

Consultations on preventive measures

> 1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent, or to minimize the risk of, significant transboundary harm.
>
> 2. States shall seek solutions based on an equitable balance of interests in the light of article 12.
>
> 3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the States of origin shall nevertheless take into account the interests of States likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.

Commentary

(1) Article 11 requires the States concerned, that is, the State of origin and the States that are likely to be affected, to enter into consultations in order to agree on the measures to prevent, or to minimize the risk of causing, significant transboundary harm. Depending upon the time at which article 11 is invoked, consultations may be prior to authorization and commencement of an activity or during its performance.

(2) The Commission has attempted to maintain a balance between two equally important considerations in this article. First, the article deals with activities that are not prohibited by international law and that, normally, are important to the economic development of the State of origin. But second, it would be unfair to other States to allow those activities to be conducted without consulting them and taking appropriate preventive measures. Therefore, the article does not provide a mere formality which the State of origin has to go through with no real intention of reaching a solution acceptable to the other States, nor does it provide a right of veto for the States that are likely to be affected. To maintain a balance, the article relies on the manner in which, and purpose for which, the parties enter into consultations. The parties must enter into consultations in good faith and must take into account each other's legitimate interests. The parties consult each other with a view to arriving at

an acceptable solution regarding the measures to be adopted to prevent, or to minimize the risk of, significant transboundary harm.

(3) It is the view of the Commission that the principle of good faith is an integral part of any requirement of consultations and negotiations. The obligation to consult and negotiate genuinely and in good faith was recognized in the Lake Lanoux award where the tribunal stated that:

> "Consultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities. The rules of reason and good faith are applicable to procedural rights and duties relative to the sharing of the use of international rivers."[66]

(4) With regard to this particular point about good faith, the Commission also relies on the judgment of the International Court of Justice in the Fisheries Jurisdiction (United Kingdom v. Iceland) case. There the Court stated that "[t]he task [of the parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other".[67] The Commission also finds the decision of the Court in the North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. Netherlands)[68] on the manner in which negotiations should be conducted relevant to this article. In those cases the Court ruled as follows:

> "(a) [T]he parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it".[69]

Even though the Court in this judgment speaks of "negotiations", the Commission believes that the good faith requirement in the conduct of the parties during the course of consultation or negotiations is the same.

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[66] Op. cit. (see note 19 above).

[67] Fisheries Jurisdiction (United Kingdom v. Iceland) case, Merits, Judgment of 25 July 1974, I.C.J. Reports 1974, para. 78.

[68] North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; and Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, I.C.J. Reports 1969, p. 3, especially paras. 85 and 87.

[69] Ibid., para. 85.

(5) The purpose of consultations is for the parties to find acceptable solutions regarding measures to be adopted in order to prevent, or to minimize the risk of, significant transboundary harm. The words "acceptable solutions", regarding the adoption of preventive measures, refers to those measures that are accepted by the parties within the guidelines specified in paragraph 2. Generally, the consent of the parties on measures of prevention will be expressed by means of some form of an agreement.

(6) The parties should obviously aim, first, at selecting those measures which may avoid any risk of causing significant transboundary harm or, if that is not possible, which minimize the risk of such harm. Under the terms of article 4, the parties are required, moreover, to cooperate in the implementation of such measures. This requirement, again, stems from the view of the Commission that the obligation of due diligence, the core base of the provisions intended to prevent, or to minimize the risk of, significant transboundary harm, is of a continuous nature affecting every stage related to the conduct of the activity.

(7) Article 11 may be invoked whenever there is a question about the need to take preventive measures. Such questions obviously may arise as a result of article 10, because a notification to other States has been made by the State of origin that an activity it intends to undertake may pose a risk of causing significant transboundary harm, or in the course of the exchange of information under article 14 or in the context of article 13 on procedures in the absence of notification.

(8) Article 11 has a broad scope of application. It is to apply to all issues related to preventive measures. For example, when parties notify under article 10 or exchange information under article 14 and there are ambiguities in those communications, a request for consultations may be made simply in order to clarify those ambiguities.

(9) Paragraph 2 provides guidance for States when consulting each other on preventive measures. The parties shall seek solutions based on an equitable balance of interests in the light of article 12. Neither paragraph 2 of this article nor article 12 precludes the parties from taking account of other factors which they perceive as relevant in achieving an equitable balance of interests.

(10) Paragraph 3 deals with the possibility that, despite all efforts by the parties, they cannot reach an agreement on acceptable preventive measures. As explained in paragraph (3) above, the article maintains a balance between the two considerations, one of which is to deny the States likely to be affected a right of veto. In this context, the Commission recalls the Lake Lanoux award where the tribunal noted that, in certain situations, the party that was likely

to be affected might, in violation of good faith, paralyse genuine negotiation efforts.[70] To take account of this possibility, the article provides that the State of origin is permitted to go ahead with the activity, for the absence of such an alternative would, in effect, create a right of veto for the States likely to be affected. The State of origin, while permitted to go ahead with the activity, is still obligated to take into account the interests of the States likely to be affected. As a result of consultations, the State of origin is aware of the concerns of the States likely to be affected and is in even a better position to seriously take them into account in carrying out the activity.

(11) The last part of paragraph 3 also protects the interests of States likely to be affected. This is intended to have a broad scope so as to include such rights as the States likely to be affected have under any rule of international law, general principles of law, domestic law, etc.

(12) In the view of one member of the Commission, in the absence of an agreed solution between States concerned, the appointment of an independent and impartial fact-finding commission is provided in article 17, paragraph 2, should have priority over a unilateral decision to proceed with the activity in question. The principle of good faith would indeed require that this be the case in relation to an instrument dealing with the prevention of significant transboundary harm.

Article 12

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 11, the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;

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[70] Op. cit. (see note 19 above), p. 128.

(d) the degree to which the States of origin and, as appropriate, States likely to be affected are prepared to contribute to the costs of prevention;

(e) the economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(f) the standards of prevention which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

Commentary

(1) The purpose of this article is to provide some guidance for States which are engaged in consultations seeking to achieve an equitable balance of interests. In reaching an equitable balance of interests, the facts have to be established and all the relevant factors and circumstances weighed.

(2) The main clause of the article provides that in order "to achieve an equitable balance of interests as referred to in paragraph 2 of article 11, the States concerned shall take into account all relevant factors and circumstances". The article proceeds to set forth a non-exhaustive list of such factors and circumstances. The wide diversity of types of activities which is covered by these articles, and the different situations and circumstances in which they will be conducted, make it impossible to compile an exhaustive list of factors relevant to all individual cases. Some of the factors may be relevant in a particular case, while others may not, and still other factors not contained in the list may prove relevant. No priority or weight is assigned to the factors and circumstances listed, since some of them may be more important in certain cases while others may deserve to be accorded greater weight in other cases. In general, the factors and circumstances indicated will allow the parties to compare the costs and benefits which may be involved in a particular case.

(3) Subparagraph (a) compares the degree of risk of significant transboundary harm to the availability of means of preventing such harm or minimizing the risk thereof and the possibility of repairing the harm. For example, the degree of risk of harm may be high, but there may be measures that can prevent the harm or reduce that risk, or there may be possibilities for repairing the harm. The comparisons here are both quantitative and qualitative.

(4) Subparagraph (b) compares the importance of the activity in terms of its social, economic and technical advantages for the State of origin and the potential harm to the States likely to be affected. The Commission in this context recalls the decision in the Donauversinkung case where the court stated that:

> "The interests of the States in question must be weighed in an equitable manner one against another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by the one to the injury caused to the other."[71]

(5) Subparagraph (c) compares, in the same fashion as subparagraph (a), the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof and the possibility of restoring the environment. The Commission emphasizes the particular importance of protection of the environment. The Commission considers principle 15 of the Rio Declaration relevant to this subparagraph where it states: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[72]

(6) The Commission considered the possibility of replacing the term "restoring" with the term "preserving", but decided to retain the former. In its view, States should consider suitable means to restore, as far as possible, the situation existing prior to the occurrence of harm. It is considered that this should be highlighted as a factor to be taken into account by States concerned which should adopt environmentally friendly measures.

(7) One member of the Commission expressed the view that subparagraph (c) should be deleted since, in the light of the definition of harm in article 2 (b), harm to the environment was already covered by the provisions of subparagraph (a). Other members felt that subparagraph (a) was more directly concerned with the degree of risk and the degree of availability of means of prevention, while subparagraph (c) addressed the need to ensure the adoption of measures which are more environmentally friendly. The latter therefore deserved to be maintained as a separate provision.

(8) Subparagraph (d) provides that one of the elements determining the choice of preventive measures is the willingness of the State of origin and States likely to be affected to contribute to the cost of prevention. For example, if the States likely to be affected are prepared to contribute to the expense of preventive measures, it may be reasonable, taking into account other factors, to expect the State of origin to take more costly but more effective preventive

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[71] Wurttemburg and Prussia v. Baden (Donauversinkung case) (1927) in Entscheidungen des Reichsgerichts in Zivilsachen (Berlin, de Gruyter), vol. 116, Appendix, pp. 18-45 (1927), in Annual Digest of Public International Law Cases, (1927-1928) (London, 1931), p. 131; see also Kansas v. Colorado (1907) 206 US 100, and Washington v. Oregon (1936) 297 US 517.

[72] See note 10 above.

measures. This however should not underplay the cost-effective measures the State of origin is obliged to take in the first instance to take appropriate measures as required under article 3.

(9) The expression "as appropriate" indicates that the State of origin and the States likely to be affected are not put on the same level as regards the contribution to the costs of prevention. States concerned frequently embark on negotiations concerning the distribution of costs for preventive measures. In so doing, they proceed from the basic principle derived from article 3 according to which these costs are to be assumed by the operator or the State of origin. These negotiations mostly occur in cases where there is no agreement on the amount of the preventive measures and where the affected State contributes to the costs of preventive measures in order to ensure a higher degree of protection that it desires over and above what is essential for the State of origin to ensure. This link between the distribution of costs and the amount of preventive measures is in particular reflected in subparagraph (d).

(10) Subparagraph (e) introduces a number of factors that must be compared and taken into account. The economic viability of the activity must be compared to the costs of prevention. The cost of the preventive measures should not be so high as to make the activity economically non-viable. The economic viability of the activity should also be assessed in terms of the possibility of changing the location, or conducting it by other means, or replacing it with an alternative activity. The words "carrying out the activity ... by other means" intend to take into account, for example, a situation in which one type of chemical substance used in the activity, which might be the source of transboundary harm, could be replaced by another chemical substance; or mechanical equipment in the plant or the factory could be replaced by different equipment. The words "replacing [the activity] with an alternative activity" are intended to take account of the possibility that the same or comparable results may be reached by another activity with no risk, or much lower risk, of significant transboundary harm.

(11) Subparagraph (f) compares the standard of prevention demanded of the State of origin to that applied to the same or comparable activity in the State likely to be affected. The rationale is that, in general, it might be unreasonable to demand that the State of origin comply with a much higher standard of prevention than would be operative in the States likely to be affected. This factor, however, is not in itself conclusive. There may be situations in which the State of origin would be expected to apply standards of prevention to the activity that are higher than those applied in the States likely to be affected, i.e., where the State of origin is a highly developed State and applies

domestically established environmental law regulations. These regulations may be substantially higher than those applied in a State of origin which because of its stage of development may have (and, indeed, have need of) few if any regulations on the standards of prevention. Taking into account other factors, the State of origin may have to apply its own standards of prevention which are higher than those of the States likely to be affected.

(12) States should also take into account the standards of prevention applied to the same or comparable activities in other regions or, if they exist, the international standards of prevention applicable for similar activities. This is particularly relevant when, for example, the States concerned do not have any standard of prevention for such activities, or they wish to improve their existing standards.

Article 13

Procedures in the absence of notification

> 1. If a State has reasonable grounds to believe that an activity planned or carried out in the territory or otherwise under the jurisdiction or control of another State may have a risk of causing significant transboundary harm, the former State may request the latter to apply the provision of article 10. The request shall be accompanied by a documented explanation setting forth its grounds.
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> 2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 10, it shall so inform the other State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations in the manner indicated in article 11.
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> 3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a period of six months, unless otherwise agreed.

Commentary

(1) Article 13 addresses the situation in which a State, although it has received no notification about an activity in accordance with article 10, becomes aware that an activity is being carried out in another State, either by the State itself or by a private entity, and believes, on reasonable grounds, that the activity carries a risk of causing it significant harm.

(2) The expression "a State" is not intended to exclude the possibility that more than one State could entertain the belief that a planned activity could adversely affect them in a significant way. The words "apply the provision of article 10" should not be taken as suggesting that the State which intends to

authorize or has authorized an activity has necessarily failed to comply with its obligations under article 10. In other words, that State may have made an assessment of the potential of the planned activity for causing significant transboundary harm and concluded in good faith that no such effects would result therefrom. Paragraph 1 allows a State to request that the State of origin of the activity take a "second look" at its assessment and conclusion, and does not prejudge the question whether the State of origin initially complied with its obligations under article 10.

(3) In order for the State likely to be affected to be entitled to make such a request, however, two conditions must be satisfied. The first is that the requesting State must have "reasonable grounds to believe" that the activity in question may have a risk of causing significant transboundary harm. The second is that the requesting State must provide a "documented explanation setting forth its grounds". These conditions are intended to require that the requesting State have more than a vague and unsubstantiated apprehension. A serious and substantiated belief is necessary, particularly in view of the possibility that the State of origin may be required to suspend implementation of its plans under paragraph 3 of article 13.

(4) The first sentence of paragraph 2 deals with the case in which the planning State concludes, after taking a "second look" as described in paragraph (2) of the present commentary, that it is not under an obligation to provide a notification under article 10. In such a situation, paragraph 2 seeks to maintain a fair balance between the interests of the States concerned by requiring the State of origin to provide the same kind of justification for its finding as was required of the requesting State under paragraph 1. The second sentence of paragraph 2 deals with the case in which the finding of the State of origin does not satisfy the requesting State. It requires that, in such a situation, the State of origin promptly enter into consultations with the other State (or States), at the request of the latter. The consultations are to be conducted in the manner indicated in paragraphs 1 and 2 of article 11. In other words, their purpose is to achieve "acceptable solutions" regarding measures to be adopted in order to prevent, or to minimize, the risk of causing significant transboundary harm, and that the solutions to be sought should be "based on an equitable balance of interests". These phrases are discussed in the commentary to article 11.

(5) Paragraph 3 requires the State of origin to introduce appropriate and feasible measures to minimize the risk, and where appropriate, to suspend the activity in question for a period of six months if it is requested to do so by

the other State during the course of consultations. States concerned could also agree otherwise.

(6) Similar provisions have been provided for in other legal instruments. Article 18 of the Convention on the Law of the Non-Navigational Uses of International Watercourses,[73] and article 3, paragraph 7, of the Convention on Environmental Impact Assessment in a Transboundary Context[74] also contemplate a procedure by which a State likely to be affected by an activity can initiate consultations with the State of origin.

(7) In the view of one member, it was purely arbitrary to provide for a six-month period of suspension in paragraph 3. Moreover, it was unclear whether said period was mentioned as a recommended time-frame or whether the State of origin was, in that case, under an obligation to suspend the activity for six months. In the view of that member, the expression "where appropriate" further complicated the interpretation of this provision. Other members defended the present formulation as a realistic one.

Article 14

Exchange of information

> While the activity is being carried out, the States concerned shall exchange in a timely manner all available information relevant to preventing, or minimizing the risk of, significant transboundary harm.

Commentary

(1) Article 14 deals with steps to be taken after an activity has been undertaken. The purpose of all these steps is the same as previous articles, viz., to prevent, or to minimize the risk of, significant transboundary harm.

(2) Article 14 requires the State of origin and the likely affected States to exchange information regarding the activity after it has been undertaken. In the view of the Commission, preventing, and minimizing the risk of, transboundary harm based on the concept of due diligence are not a once-and-for-all effort; they require continuing efforts. This means that due diligence is not terminated after granting authorization for the activity and undertaking the activity; it continues in respect of monitoring the implementation of the activity as long as the activity continues.

(3) The information that is required to be exchanged, under article 14, is whatever would be useful, in the particular instance, for the purpose of prevention of risk of significant harm. Normally such information comes to the

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[73] General Assembly resolution 51/229, annex.

[74] See note 20 above.

knowledge of the State of origin. However, when the State that is likely to be affected has any information which might be useful for prevention purposes, it should make it available to the State of origin.

(4) The requirement of exchange of information is fairly common in conventions designed to prevent or reduce environmental and transboundary harm. These conventions provide for various ways of gathering and exchanging information, either between the parties or through providing the information to an international organization which makes it available to other States.[75] In the context of these articles, where the activities are most likely to involve a few States, the exchange of information is effected between the States directly concerned. Where the information might affect a large number of States, relevant information may be exchanged through other avenues, such as for example, competent international organizations.

(5) Article 14 requires that such information should be exchanged in a timely manner. This means that when the State becomes aware of such information, it should inform the other States quickly so that there will be enough time for the States concerned to consult on appropriate preventive measures or the States likely to be affected will have sufficient time to take proper actions.

(6) There is no requirement in the article as to the frequency of exchange of information. The requirement of article 14 comes into operation only when States have any information which is relevant to preventing, or minimizing the risk of, transboundary harm.

Article 15

National security and industrial secrets

> Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the

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[75] For example, article 10 of the Convention on the Protection of Marine Pollution from Land-based Sources, International Legal Materials, vol. 13 (1974), p. 352; article 4 of the Vienna Convention for the Protection of the Ozone Layer, ibid., vol. 26, p. 1529; and article 200 of the United Nations Convention on the Law of the Sea (see note 14 above), speak of individual or joint research by the States parties on prevention or reduction of pollution and of transmitting to each other directly or through a competent international organization the information so obtained. The Convention on Long-Range Transboundary Air Pollution provides for research and exchange of information regarding the impact of activities undertaken by the States parties, International Legal Materials, vol. 18 (1979), p. 1442. Examples are found in other conventions such as article VI, para. 1 (iii), of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters (see note 17 above); article 17 of the United Nations Convention on Biological Diversity (see note 20 above); and article 13 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, (see note 23 above).

State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Commentary

(1) Article 15 is intended to create a narrow exception to the obligation of States to provide information in accordance with articles 9, 10 and 14. In the view of the Commission, States should not be obligated to disclose information that is vital to their national security or is considered an industrial secret. This type of clause is not unusual in treaties which require exchange of information. Article 31 of the Convention on the Law of the Non-Navigational Uses of International Watercourses[76] also provides for a similar exception to the requirement of disclosure of information vital to national defence or security.

(2) Article 15 includes industrial secrets in addition to national security. In the context of these articles, it is highly probable that some of the activities which come within the scope of article 1 might involve the use of sophisticated technology involving certain types of information which are protected even under the domestic law. Normally, domestic laws of States determine the information that is considered an industrial secret and provide protection for them. This type of safeguard clause is not unusual in legal instruments dealing with exchange of information relating to industrial activities. For example, article 8 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes[77] and article 2, paragraph 8, of the Convention on Environmental Impact Assessment in a Transboundary Context[78] provide for similar protection of industrial and commercial secrecy.

(3) Article 15 recognizes the need for balance between the legitimate interests of the State of origin and the States that are likely to be affected. It therefore requires the State of origin that is withholding information on the grounds of security or industrial secrecy to cooperate in good faith with the other States in providing as much information as can be provided under the circumstances. The words "as much information as can be provided" include, for example, the general description of the risk and the type and the extent of harm to which a State may be exposed. The words "under the circumstances" refer to

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[76] See note 73 above.

[77] See note 23 above.

[78] See note 20 above.

the conditions invoked for withholding the information. Article 15 essentially encourages and relies on the good faith cooperation of the parties.

Article 16

Non-discrimination

> Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of activities within the scope of the present draft articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

Commentary

(1) This article sets out the basic principle that the State of origin is to grant access to its judicial and other procedures without discrimination on the basis of nationality, residence or the place where the injury might occur.

(2) Article 16 contains two basic elements, namely, non-discrimination on the basis of nationality or residence and non-discrimination on the basis of where the injury might occur. The rule set forth obliges States to ensure that any person, whatever his nationality or place of residence, who might suffer significant transboundary harm as a result of activities referred to in article 1 should, regardless of where the harm might occur, receive the same treatment as that afforded by the State of origin to its nationals in case of possible domestic harm. This obligation does not intend to affect the existing practice in some States of requiring that non-residents or aliens post a bond, as a condition of utilizing the court system, to cover court costs or other fees. Such a practice is not "discriminatory" under the article, and is taken into account by the phrase "in accordance with its legal system".

(3) Article 16 also provides that the State of origin may not discriminate on the basis of the place where the damage might occur. In other words, if significant harm may be caused in State A as a result of an activity referred to in article 1 in State B, State B may not bar an action on the grounds that the harm would occur outside its jurisdiction. This provision is also intended to cover damage likely to occur to persons without identity papers or passports, as well as indigenous people or kinship groups.

(4) This rule is residual, as indicated by the phrase "unless the States concerned have agreed otherwise". Accordingly, States concerned may agree on the best means of providing protection or redress to persons who may suffer a significant harm, for example through a bilateral agreement. States concerned are encouraged under the present draft articles to agree on a special regime

dealing with activities with the risk of significant transboundary harm. In such arrangements, States may also provide for ways and means of protecting the interests of the persons concerned in case of significant transboundary harm. The phrase "for the protection of the interest of persons" has been used to make it clear that the article is not intended to suggest that States can decide by mutual agreement to discriminate in granting access to their judicial or other procedures or a right to compensation. The purpose of the inter-State agreement should always be the protection of the interests of the victims of the harm.

(5) Precedents for the obligation contained in this article may be found in international agreements and in recommendations of international organizations. For example, the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden of 19 February 1974 in its article 3 provides as follows:

> "Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court of the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.
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> "The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured party than the rules of compensation of the State in which the activities are being carried out."[79]

The Council of the Organization for Economic Cooperation and Development (OECD) has adopted a recommendation on implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution. Paragraph 4 (a) of that recommendation provides as follows:

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[79] United Nations, Treaty Series, vol. 1092, p. 279, reprinted in International Legal Materials, vol. XIII (1974), p. 591. Similar provisions may be found in article 2, paragraph 6, of the ECE Convention on Environmental Impact Assessment in a Transboundary Context, of 25 February 1991, document E/ECE/1250; the Guidelines on responsibility and liability regarding transboundary water pollution, part II.E.8, prepared by the ECE Task Force on responsibility and liability regarding transboundary water pollution, document ENVWA/R.45, 20 November 1990; and the Draft ECE Charter on environmental rights and obligations, para. 6, prepared at a meeting of experts on environmental law, 25 February-1 March 1991, document ENVWA/R.38, annex I.

"Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant risk of transfrontier pollution shall at least receive equivalent treatment to that afforded in the country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status ..."[80]

Article 17

Settlement of disputes

1. Any dispute concerning the interpretation or application of the present draft articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties, including submission of the dispute to mediation, conciliation, arbitration or judicial settlement.

2. Failing an agreement in this regard within a period of six months, the parties concerned shall, at the request of one of them, have recourse to the appointment of an independent and impartial fact-finding commission. The report of the commission shall be considered by the parties in good faith.

Commentary

(1) Article 17 provides a basic rule for the settlement of disputes arising from the interpretation or application of the regime of prevention set out in the present draft articles. The rule is residual in nature and applies where the States concerned do not have an applicable agreement for the settlement of such disputes.

(2) It is assumed that the application of this article would come into play only after States concerned have exhausted all the means of persuasion at their disposal through appropriate consultation and negotiations. These could take place as a result of the obligations imposed by the present draft articles or otherwise in the normal course of inter-State relations.

(3) Failing any agreement through consultation and negotiation, the States concerned are urged to continue to exert efforts to settle their dispute, through other peaceful means of settlement to which they may resort by mutual

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[80] OECD document C(77)28 (Final), annex, in OECD, OECD and the Environment, 1986, p. 150. This is also the main thrust of principle 14 of the draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States, approved in decision 6/14 of the Governing Council of the United Nations Environment Programme (UNEP) of 19 May 1978 (see Official Records of the General Assembly, Thirty-third Session, Supplement No. 25 (A/33/25), annex I). A discussion of the principle of equal access may be found in Van Hoogstraten, Environmental Policy and Law, vol. 2 (1976), p. 77.

agreement, including mediation, conciliation, arbitration or judicial settlement. These are means of peaceful settlement of disputes set forth in Article 33 of the Charter of the United Nations, in the second paragraph of the relevant section of the Friendly Relations Declaration[81] and in paragraph 5 of section I of the Manila Declaration,[82] which are open to States as free choices to be mutually agreed upon.[83]

(4) If the States concerned are unable to reach an agreement on any of the means of peaceful settlement of disputes within a period of six months, paragraph 2 of article 17 obliges States, at the request of one of them, to have recourse to the appointment of an independent and impartial fact-finding commission. This is a compulsory procedure prescribed which, in the opinion of the Commission, is useful and necessary to help States to resolve their disputes expeditiously on the basis of an objective identification and evaluation of facts. Lack of proper appreciation of the facts is often at the root of differences or disputes among States.

(5) Inquiry or resort to independent or impartial fact-finding commissions is a well-known method incorporated in a number of bilateral or multilateral treaties, including the Covenant of the League of Nations, the Charter of the United Nations and the constituent instruments of certain specialized agencies and other international organizations within the United Nations system. Its potential to contribute to the prevention of international disputes is recognized by General Assembly resolution 1967 (XVIII) of 16 December 1963 on the "Question of methods of fact-finding".[84]

(6) By virtue of the mandate to investigate the facts and to clarify the questions in dispute, such commissions usually have the competence to arrange for hearings of the parties, the examination of witnesses or on-site visits.

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[81] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex.

[82] Manila Declaration on the Peaceful Settlement of International Disputes, General Assembly resolution 37/10, annex.

[83] For an analysis of the various means of peaceful settlement of disputes and references to relevant international instruments, see Handbook on the Peaceful Settlement of Disputes between States (United Nations publication, Sales No. E.92.V.7).

[84] Ibid., p. 25. See also the Declaration on Fact-Finding in the Field of the Maintenance of International Peace and Security, General Assembly resolution 46/59, annex.

(7) The report of the Commission usually should identify or clarify "facts". Insofar as they involve no assessment or evaluation, they are generally beyond further contention. States concerned are still free to give such weight as they deem appropriate to these "facts" in arriving at a resolution of the dispute. However, article 17 requires States concerned to give the report of the fact-finding commission a good-faith consideration at the least.

(8) The requirement of "good faith" was elaborated by the International Court of Justice in the North Sea Continental Shelf case between Denmark and the Federal Republic of Germany. In implementing this principle, the Court stated that the parties to the dispute "are under an obligation to conduct themselves so that the negotiations are meaningful, which will not be the case when either of them insist upon its own position without contemplating any modification of it".[85]

(9) Article 17 is not self-executory. It requires further elaboration, by way of an annex, on the manner and means of the constitution and functioning of the fact-finding commission. States accepting article 17 could elaborate the procedure concerning the constitution of such a Commission by special agreement. Any future convention incorporating the regime of prevention could also provide the necessary elaboration. One model for this purpose exists in article 33 of the Convention on the Non-Navigational Uses of International Watercourses.[86] It was, however, considered premature at the current stage to set out such a detailed procedure in the present text, before a decision is taken as to the form which the draft articles should take.

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[85] I.C.J. Reports 1969, p. 3, at p. 47, para. 85. See also the Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997, para. 141.

[86] See note 73 above.

CHAPTER V

DIPLOMATIC PROTECTION

A. Introduction

56. The Commission at its forty-eighth session, in 1996, identified the topic of "Diplomatic protection" as one of three topics appropriate for codification and progressive development.[87] In the same year, the General Assembly in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a Working Group on the topic.[88] The Working Group submitted a report at the same session which was endorsed by the Commission.[89] The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.[90] The Commission also decided that it should endeavour to complete the first reading of the topic by the end of the present quinquennium.

57. At its 2501st meeting, on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.

58. The General Assembly in paragraph 8 of its resolution 52/156 endorsed the decision of the Commission to include in its agenda the topic "Diplomatic protection".

B. Consideration of the topic at the present session

59. At the present session, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/484).

60. The Commission considered the preliminary report of the Special Rapporteur at its 2520th to 2523rd meetings, from 28 April to 1 May 1998.

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[87] Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 249 and annex II, addendum 1.

[88] Ibid., Fifty-second Session, Supplement No. 10 (A/52/10), chap. VIII.

[89] Ibid., para. 171.

[90] Ibid., paras. 189-190.

1. Introduction by the Special Rapporteur of his preliminary report

61. The preliminary report raised a number of basic issues which underlie the topic and on which the Special Rapporteur sought the views of the Commission. The issues were divided into two broad categories: (a) the legal nature of diplomatic protection; and (b) the nature of the rules governing diplomatic protection.

(a) The legal nature of diplomatic protection

(i) Origin of diplomatic protection

62. The Special Rapporteur, referring to the report of the Working Group of 1997 on the topic, noted that the topic of "Diplomatic protection" involved mainly codification and that its customary origin was shaped by the dictum in the Mavrommatis Palestine Concessions case.[91] Referring to the historical use of the institution of diplomatic protection, the Special Rapporteur referred to certain criticisms that had been made over time of diplomatic protection. Those criticisms include the assertions that the institution of diplomatic protection was discriminatory because only powerful States were able to use it against weaker States. According to this criticism, diplomatic protection was not egalitarian, since the possibility of the individual having his or her cause internationalized depended on the State to which that individual was linked by nationality. Other criticisms included the assertion that diplomatic protection had served as a pretext for intervention in the affairs of certain countries.[92]

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[91] The Permanent Court of International Justice stated that:

> "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant."

P.C.I.J., Series A, No. 2, Judgment of 30 August 1924, p. 12.

[92] See the individual opinion of Judge Padilla Nervo in the Barcelona Traction, Light and Power Company, Limited case (Belgium v. Spain), Judgment of 5 February 1970, where he stated that:

> "The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims,

The Special Rapporteur noted that the Calvo doctrine was formed to prevent abuse and to allow the foreign national to agree to be bound by the principle of equality with nationals who are subject to the sole jurisdiction of their courts alone.

63. The Special Rapporteur explained that at the heart of diplomatic protection there was a dispute between a host State and a foreign national whose rights have been denied and as a result who suffered injuries. If the foreign national was unable to internationalize the dispute and take it out of the sphere of local law, his or her State of nationality, at its discretion, could espouse the individual's claim by having it undergo a veritable "transformation" since only a State could invoke the responsibility of another State. He felt that this traditional view was based largely on a fiction of law because it was the damage inflicted on the foreign national which served to determine the responsibility of the host State and to assess the reparation due to the State of nationality.[93]

64. He further noted that in formulating the principle of exhaustion of local remedies in article 22 of the draft articles on State responsibility,[94] the Commission had taken into account the doctrinal debate as to whether the rule involved was "procedural" or "substantive". The Commission had opted for the second view and consequently the responsibility of the host State would arise only after local remedies had been exhausted by individuals. In the Special Rapporteur's view it was unclear from the Commission's commentary, however, how such a right was transformed following local proceedings into a right of the State of nationality, so as to revert to the logic of diplomatic protection.

65. He also made reference to later developments where States through agreements recognized the right of the State of nationality to take action, including before an arbitral body, to enforce the rights accorded by the treaty to their nationals or where an individual was granted direct access to international arbitration. The Special Rapporteur believed that the above development and the fact that some legal personality was conferred on the

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threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a Government to make the reparations demanded.",

I.C.J. Reports, 1970, p. 246.

[93] See Chorzow Factory, P.C.I.J., Series A, No. 17, Judgment of 13 September 1928, p. 28.

[94] For article 22 and its commentary see Yearbook ... 1997, vol. II (Part Two), pp. 30-50.

individual, as the direct beneficiary of international law, led to more clear-cut doctrinal queries concerning the relevance of the traditional view of diplomatic protection.

(ii) Recognition of the rights of the individual at the international level

66. The Special Rapporteur referred to the emergence of a large number of multilateral treaties recognizing the right of individual human beings to protection independently from the intervention by the States and directly by the individuals themselves through access to international forums. In this context he referred to the right of petition. He further referred to the recognition of basic human rights as creating obligations erga omnes and creating an interest on the part of all States.[95] These developments, together with the proliferation of bilateral investment promotion and protection agreements and the creation of bodies[96] whereby a national of one State could present a claim against another State, created a legal framework outside the traditional area of diplomatic protection.

67. The Special Rapporteur noted that, in general, the domestic law of States did not provide any "right" to diplomatic protection for the nationals. Noting developments in some recent constitutions where the right to diplomatic protection appeared to have been granted to nationals, he felt that such provisions in the constitutions expressed more a moral duty than a legal obligation, since any decision on this matter by a State would be influenced by political considerations and the diplomatic relations between the States concerned.

(iii) The rights involved in diplomatic protection

68. The Special Rapporteur stated that it had been established that the State had a "procedural" right, which it might waive, to bring an international claim in order to protect its nationals when they had suffered injury as a result of a violation of international law. In keeping with the traditional view of diplomatic protection, a State is enforcing its own right by endorsing the claim of its own national. A more contemporary approach suggests that the State is simply an agent of its national who has a legally protected interest at the international level. Depending on whether one opted for the right of States or for the right of the national, one would be placing emphasis either on an

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[95] Barcelona Traction case (see note 92 above), p. 32, paras. 33-34.

[96] Such as Iran-United States Claims Tribunal established by the Algiers Agreement of 19 January 1981, and the arbitration procedure envisaged under the 1965 Convention on the Settlement of Disputes between States and Nationals of other States, United Nations, Treaty Series, vol. 575, p. 159.

extremely old custom, which gave sovereignty more than its due, even resorting to a fiction, or on the progressive development of custom, taking account of reality by means of international recognition of human rights. The approach chosen will have practical implications for the formulations of the provisions under this topic.

(b) The question of "primary" and "secondary" rules

69. The Special Rapporteur sought the Commission's guidance as to whether the topic should be confined to secondary rules as recommended by the Working Group of 1997 or could be more flexible since, in his view, international law could not be placed in watertight compartments of "primary" and "secondary" rules. Recalling that the recommendation by the Working Group and its approval by the Commission was due to the impasse the Commission had reached in its first attempt to codify the topic "Responsibility of States for damage to the person and property of aliens", the Special Rapporteur suggested another approach. According to that approach, the Commission would limit itself to secondary rules and discuss primary rules only in the context of general categories and, where necessary, with a view to the appropriate codification of secondary rules. Examples included situations of nationality link of natural or legal persons or grounds for exoneration from responsibility based on the conduct of the individual claimant. Accordingly, it would not be the granting of nationality that would be considered, but its applicability to another State. Similarly, it would not be the individual's compliance with the host countries' legislation that would be considered, but the circumstances in which the individual's conduct constituted a ground for exonerating the host State.

70. The Special Rapporteur also suggested changing the title of the topic to "Diplomatic protection of person and property", which appeared more in line with its content. The new title would also clarify the distinction between this topic and those dealing with diplomatic and consular relations.

2. Summary of the debate

(a) General comments

71. It was generally agreed that topic dealt with an issue that was complex and of great practical significance and that there was hardly any other topic that was as ripe for codification as diplomatic protection and on which there was such a comparatively sound body of hard law.

72. A comment was made that much of international law regarding diplomatic protection had taken shape with the spread of economic, social and political ideas from Europe and North America to other parts of the world. In developing the law towards universal application, care must be taken to avoid undue

reliance on outdated materials and, conversely, there was a constant need for modernization and for taking into account the attitudes of the newer States.

73. It was noted that the original purpose of the institution of diplomatic protection had been to mitigate the disadvantages and injustices to which natural and legal persons had been subjected. Hence, far from being an oppressive institution, diplomatic protection had at least partially rectified the injustices of a system that reduced the individual, and specifically the private individual, to the rank not of a subject of international law, but of a victim of violations of that law. Nor was diplomatic protection "in essence discriminatory". It was discriminatory in its exercise because it was almost exclusively the prerogative of the most powerful States. Therefore, it was important not to generalize unduly.

74. It was noted that it might be appropriate to establish guidelines or rules - such as nationality, meritorious claim, denial of justice or violation of fundamental human rights - with a view to preventing abuses of the foreign State's discretionary power to provide diplomatic protection.

75. Other views were expressed to the effect that, despite some abuse in the history of diplomatic protection, the institution of diplomatic protection had been frequently used among States of equal status and often within the same region.

(b) The customary conception of diplomatic protection

76. Some members did not agree with the suggestion that a legal interest on the part of a State in the fate of its nationals involved a legal fiction. They contended that there was nothing wrong in the notion that a State might have such an interest. Diplomatic protection was a construction in the same sense as the concepts of possession and ownership were constructions. For that reason the diplomatic protection in the context of the Mavrommatis construct should not be considered a fiction. Some other members were not persuaded that the analogy to a legal fiction by the Special Rapporteur was misleading. In their view, law was made up of fictions or, in other words, of normative reconstructions of reality.

77. The view was also expressed that regardless of what it was called - fiction, novation, substitution - what was involved was a theoretical approach which was not relevant to the normative development of the subject. The main question, as the Special Rapporteur had rightly emphasized, was who held the right exercised by way of diplomatic protection - the State of nationality or the injured victims? Clearly, the answer, according to this view, must always be the State; and in principle its powers in that regard were discretionary. Diplomatic protection had always been a sovereign prerogative of the State as a

subject of international law. Had it been otherwise, no agreement would have been concluded after the Second World War to indemnify for property that had been nationalized.

78. As to whether, in exercising diplomatic protection, a State was enforcing its own right or the right of an injured national, the observation was also made that a person linked by nationality to a State was a part of its population and therefore one of the State's constituent elements. The protection of its nationals was a State's fundamental obligation, on the same plane as the preservation of its territory or the safeguarding of its sovereignty. At the same time the State was defending the specific rights and interests of the national that had been "injured" by another State. Therefore, no rigid distinction could be drawn between the rights of the State and the rights of its nationals; the two sets of rights were complementary and could be defended in concert. It was further noted that a State had in general an interest in seeing that its nationals were fairly treated in a foreign country, but it was an exaggeration to suggest that, whenever a national was injured in a foreign State, the State of origin was also injured. In practice damages are measured in relation to the injury suffered by the individual and not by the State, as if the injury to the individual was in fact the cause of action.

79. It was also stated that it was important to determine who had the direct and immediate legal interest, the attributes and the powers to bring an international claim. According to one view, the State had no such direct and immediate interest. If that were the case, the rights in question would be ineluctable and could not be exercised at the State's discretion. For example, agreements on the protection of foreign investments gave persons, whether natural or legal, the legal capacity to bring an international claim. The same was true in the case of the Calvo clause, whereby the alien contractually declined diplomatic protection from his State of origin. In that case, too, it was clear that only the individual had a direct and immediate interest in the claim. Consequently, the debate on the legal fiction regarding the holder of those rights led nowhere, and the Commission should instead focus on the rights and legal interests that were being protected.

80. According to another view, the State exercised vicariously a right originally conferred on the individual. Therefore, it would be necessary to distinguish clearly between the exercise of the right protected and the right itself. The State has a discretionary power to exercise diplomatic protection, despite the fact that the rights protected were not those of the State, but rather those of the injured individual. The Special Rapporteur also agreed that this distinction between the possession of the right and its exercise might be

useful in order to reconcile the customary law in this matter and the new developments.

81. In this context a comment was made that the Commission might want to reconsider the issue of the discretionary right of the State to diplomatic protection with no right to the individual. On the other hand, the view was also expressed that in deciding whether to exercise diplomatic protection, in relation to a particular case, a State has to evaluate matters such as the overall interest of the State in the conduct of foreign policy and not simply the interest of the individual citizen who may have been injured as the result of a wrongful act of another State. Hence the exercise of diplomatic protection should be at the discretion of the State.

82. It was noted that, given the complexity of the issue, it would be inappropriate to burden the subject with theoretical concepts. For instance, the question of recognizing that the individual had the status of a subject of international law was highly contentious and should not be raised at the current stage. It would be better to adhere to the practice, particularly the judicial practice, whereby the individual was treated as a beneficiary of international law.

(c) The relationship between human rights and diplomatic protection

83. As regards the relationship between human rights and diplomatic protection, a number of comments were made which expressed caution in assimilating the two institutions or establishing a hierarchy between them.

84. It was noted that, while it was true that the law of diplomatic protection had existed long before the emergence of human rights as a term of art in international law, the two approaches existed in parallel, and their respective potentials overlapped only partially. To jettison diplomatic protection in favour of human rights would be, in some instances, to deprive individuals of a protection which they had previously enjoyed. Of course, human rights could now serve to buttress the diplomatic protection exercised by the State of nationality: some countries, for example, have relied wherever possible on a human rights argument in exercising diplomatic protection, as a claim based on human rights was clearly more appealing to many States than one based on an international minimum standard that had been a bone of contention throughout the nineteenth century and the first half of the twentieth century. In this context, it was noted that the traditional "Mavrommatis approach" to diplomatic protection thus had its strong points and should not be discarded without careful consideration of what was required in order to render the individual's rights effective. It was noted that the human rights approach could be allowed to permeate the Commission's further debate on the topic on a case-by-case

basis, but the Commission must not continue to question the very underpinning of diplomatic protection in adopting such a focus.

85. The comment was made that the human rights system worked in a similar way to the principles of diplomatic protection: it was a condition of admissibility that the claimant should exhaust any available local remedies, and States had the discretionary power of espousing a claim on behalf of an individual or corporation. The practice of the European Commission of Human Rights was very similar: there had been important cases of principle in which an individual had decided to withdraw his claim but the European Commission had declined to treat the claim as withdrawn because there was an objective interest in maintaining the standards of the public order of Europe. The Commission should therefore be careful not to adopt false polarities between human rights and diplomatic protection. The system of diplomatic protection should not be marginalized when no effective substitute was yet available.

86. A comment was also made that human rights and diplomatic protection were entirely distinct, and a more thorough consideration of the question would reveal that diplomatic protection had traditionally concerned strictly patrimonial rights, whereas human rights concerned the very essence of personal freedom. The rights traditionally covered by diplomatic protection included most-favoured-nation treatment and performance requirements imposed upon enterprises which were not the core concern of traditional human rights. This view was not shared by other members of the Commission. It was noted that while, in practice, diplomatic protection was most frequently invoked in cases where patrimonial rights were violated, other rights could likewise call it into play. It would therefore be too restrictive to assume that diplomatic protection dealt exclusively with damage to property.

87. The view was also expressed that it would be possible to strike a balance between diplomatic protection and the exigencies of human rights. This issue was particularly relevant in the context of the question of legal persons - a grey area which neither the Commission nor other bodies had explored in depth - but had instead contented themselves with citing the somewhat obscure obiter dictum of the International Court of Justice in the Barcelona Traction case.[97] It was further noted that it was no coincidence that, at the level of the European system for protection of human rights, the rights closest to those of legal persons, namely, property rights, were dealt with not in the European Convention on Human Rights, but in a separate protocol thereto. Therefore, a new approach seemed to be gaining ground, and that would be the crucial aspect

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[97] See note 92 above.

of the study to be conducted by the Special Rapporteur. In this context, however, it was noted that the American Convention on Human Rights set out the principle that no one could be arbitrarily deprived of his property, but that principle was closely tied in with the human rights of due process.

88. The comment was made that the difference between individual petition procedures in human rights cases and diplomatic protection was not as pronounced as it seemed to be. In some cases, an element of diplomatic protection could be an additional component in a human rights petition procedure. For instance, in the Soering case,[98] the Government of Germany had brought a claim in the European Court of Human Rights on behalf of its national. The literature also recognized that there was at least a theoretical link between the two institutions.

89. It was observed that if injury to a foreign national involved a violation of a right recognized as a human right, nothing could prevent that foreign national's State of origin from espousing his or her claim. The practice in some countries had stressed that approach. If injury to aliens in the form of violations of human rights were excluded from the application of diplomatic protection, no effective remedy would be available in cases when an alien did not have access to procedures before an international human rights body. In most cases of violations of the human rights of foreigners, however, such as unfair imprisonment or mistreatment, international procedures were not available, and it was accordingly vital to confirm the right of the State of origin to exercise diplomatic protection.

90. In analysing the relationship between human rights and diplomatic protection, attention was drawn to a situation of violation of human rights under a given regime where espousing the claim by the State under that regime did not fall within the ambit of diplomatic protection.

91. The Special Rapporteur stressed that he had never sought to contrast diplomatic protection and human rights. He had simply asserted that the concept of diplomatic protection, which predated the concept of human rights, could no longer be studied without taking careful account of the evolution of human rights in recent years. It was countries undergoing a transition to democracy that had the greatest interest in strengthening human rights, and thus in ensuring that account was taken of individuals in actions by the State.

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[98] European Court of Human Rights, Soering case, decision of 26 January 1989, Series A, No. 161.

(d) Preconditions for the exercise of diplomatic protection

92. It was stated that the necessary preconditions for diplomatic protection had been established in the Mavrommatis judgment. The first precondition was that there must be proof that an injury had been inflicted on a national; that the injury was a breach of international law; that it was imputable to the State against which the claim was brought; and, lastly, that a causal link existed between the injury inflicted and the imputation of the injury. There would thus be three main protagonists in an international claim for diplomatic protection: the subject whose person, property or rights had been injured; the State causing the injury; and the State espousing the claim. The second precondition for the exercise of diplomatic protection was that the injured subjects must have been unable to obtain satisfaction through domestic remedies which afforded the State an opportunity to avoid a breach of its international obligations by making timely reparation.

93. It was noted that the basis for the prior exhaustion of local remedies was empirical, and it was arguable that there was an implied risk principle which meant that there was no need to exhaust local remedies in the absence of any prior voluntary connection with the jurisdiction concerned.[99] A view was also expressed that the requirement of the exhaustion of local remedies entailed a further consequence that the model of subrogation could not be applied to diplomatic protection, as there was a fundamental change in the character of the right. It was further noted that the Commission would have to address the question as to whether the resort to an international body to protect human

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[99] See, for example, in the Case Concerning the Aerial Incident of July 27th 1955 (Israel v. Bulgaria), Preliminary Objections, where in response to a preliminary objection by Bulgaria that the domestic jurisdiction of Bulgaria had not been exhausted, Israel argued that there were a number of important limitations to the application of the exhaustion of local remedies rule:

> "[I]t is essential ... that a link should exist between the injured individual and the State whose actions are impugned ... [T]he rule is only applied when the alien, the injured individual, has created, or is deemed to have created, a voluntary, conscious and deliberate connection between himself and the foreign State whose actions are impugned ... The victims [in this case] had no voluntary, conscious and deliberate connection with Bulgaria. To the contrary, such connection as they did have, if such it can be called, was involuntary, unknown and completely unpremeditated."

See ibid., ICJ Pleadings, 1959, pp. 533-534. The Court found that it was without jurisdiction on another ground and did not rule on other issues raised as preliminary objections, including the exhaustion of local remedies requirement.

rights must be considered a "local remedy", even though a simple textual interpretation could not answer the question in the affirmative.

94. In the context of local remedies, the question arose as to whether the minimum standard of treatment accorded to aliens under international law should be the sole standard. Should the standard of treatment not be defined by reference to domestic law, so as to avoid conferring privileged status on aliens? To be sure, application of either standard would give rise to controversy, given the cultural, social, economic and legal differences which might exist between the host State and the foreign State.

95. A comment was made that foreign investors were in a privileged position vis-à-vis nationals, as they had recourse to three procedures - domestic remedies, diplomatic protection and international arbitration - for the protection of their rights, whereas nationals could avail themselves only of domestic remedies.

96. It was further noted that the State defending its nationals could not, in the exercise of diplomatic protection, have recourse to the threat or use of force. Hence, an important contribution the Commission could make in its consideration of the topic was to identify what means were available to States in making their rights and the rights of their nationals effective in the context of diplomatic protection.

97. Questions were raised as to whether a State could exercise diplomatic protection in parallel with an international recourse taken directly by an injured individual or whether the State only had the right to exercise diplomatic protection after all other domestic modes of dispute settlement were exhausted.

(e) The question of "primary" and "secondary" rules

98. It was observed that theories and concepts such as the distinction between primary and secondary rules could not helpfully be discussed before addressing the institutions and rules of diplomatic protection. These points could be debated as they came up in specific contexts. It was felt that the broad meaning of diplomatic protection was clear: the important issues were the admissibility of claims and the law relating to the prior conditions which had to be satisfied before claims were made. The 1997 report of the Working Group on Diplomatic Protection should be followed in this respect.

99. Comments were made that, although the Commission was dealing with secondary rules and it would cause confusion if it pretended otherwise, the distinction between primary and secondary rules should not be used as an absolute test. Classification of a rule as primary or secondary would depend on the nature of the issue on a particular occasion. However, the question was not of overlap

but of a double function of admissibility and merit with respect, for example, to the "clean hands" rule, certain issues of nationality and the whole area of acquiescence and delay. Therefore, the Commission would be unable to consider, in the context of this topic, secondary rules in isolation. It must also touch on primary rules, as secondary rules, being procedural, were the means used to enforce rights conferred.

100. As regards which law governed diplomatic protection, it was generally agreed that it was international law. In this context, it was noted that some Governments in their constitutions committed themselves to their nationals to exercise diplomatic protection. The view was also expressed that such national laws did not affect the discretionary right of the State to exercise diplomatic protection.

101. It was also observed that there was room for progressively developing and significantly modernizing the law governing diplomatic protection. Even if the law of the State was taken as the starting point, it should be possible, with a view to the progressive development of the law, to enhance the place of the individual in the context of diplomatic protection, in particular where indemnification was concerned.

102. The comment was made that the study of diplomatic protection must include study of the means for exercising it. The traditional machinery for the peaceful settlement of disputes, in particular negotiation but also mediation, good offices and arbitration, should be considered, as well as the question of countermeasures in the context of diplomatic protection.

103. As regards the title of the topic, a comment was made that it could perhaps be made more precise, but that could be done later in the light of the draft to be prepared.

(f) The relationship between the topics of "Diplomatic protection" and "State responsibility"

104. It was observed that it was important to remember that diplomatic protection was just one part of the vast field of international responsibility. As a means of giving effect to State responsibility, it created a relationship between two States: the "protector" State and the State against which action was being taken, which was viewed as responsible for an internationally wrongful act that had caused injury to a national of the "protector" State. The contemporary emphasis on protection of human rights, even though correct, should not obscure the fact that the State-to-State relationship was an essential element in determining the nature of diplomatic protection. In this context, it was also observed that the topics of diplomatic protection and State responsibility were linked in terms of reasoning: the State was responsible for

any violation of international law which it had committed or had been attributed to it, as stated in Part One of the draft articles on State responsibility. If that first condition was met, a number of consequences arose (Part Two of the draft), the main one being the obligation to provide compensation. When the obligation to compensation was owed to a private individual, who, with rare exceptions, did not have the capacity to act at the international level, diplomatic protection came into play and thus proved to be an extension, a consequence and a component of the law of State responsibility.

105. Attention was also drawn to the problem of dealing with questions of direct damage to States, which, while clearly forming no part of the Commission's mandate, were nonetheless often inextricably bound up with questions of diplomatic protection in practice. Sometimes a particular case could represent both a direct and an indirect State interest. An example of such a case was the Rainbow Warrior incident, where New Zealand brought a claim regarding violations of its sovereignty, and on behalf of the Netherlands regarding a photographer who had lost his life in the incident, who had been treated as being of Netherlands nationality for the purposes of the settlement. Also the Chernobyl incident had involved direct economic losses by private individuals in a number of States, as well as the potential for the States themselves to bring claims for direct damage to their airspace, had they so wished. These examples involved actual or potential diplomatic protection in respect of private interests. The fact that they were not exclusively concerned with private interests should not place them outside the purview of the Commission's consideration.

(g) Scope of the topic

106. A comment was made that consideration should be given to extending diplomatic protection to the nationals of a State who suffered damage, not while they were abroad but while they were in their own State, as a result of an internationally wrongful act caused by a foreign diplomatic mission or the officials of such a mission who enjoyed jurisdictional immunity and, consequently, could not be brought before the local courts. There was no reason why a State which protected its nationals when they were injured abroad as a result of a violation of international law in those circumstances should not do likewise if they were injured when resident on the national territory.

3. Establishment of a Working Group

107. The International Law Commission, at its 2534th meeting, on 22 May 1998 established an open-ended Working Group, chaired by Mr. M. Bennouna, Special Rapporteur of the topic, to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic and also to

provide directions in respect of issues which should be covered in the second report of the Special Rapporteur for the fifty-first session of the Commission.

108. The Working Group held two meetings, from 25 to 26 May 1998. As regards the approach to the topic, the Working Group agreed to the following:

(a) The customary law approach to diplomatic protection should form the basis for the work of the Commission on this topic;

(b) The topic will deal with secondary rules of international law relating to diplomatic protection; primary rules shall only be considered when their clarification is essential to providing guidance for a clear formulation of a specific secondary rule;

(c) The exercise of diplomatic protection is the right of the State. In the exercise of this right, the State should take into account the rights and interests of its national for whom it is exercising diplomatic protection;

(d) The work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and in providing them with more direct and indirect access to international forums to enforce their rights. The Working Group was of the view that the actual and specific effect of such developments, in the context of this topic, should be examined in the light of State practice and insofar as they relate to specific issues involved such as the nationality link requirement;

(e) The discretionary right of the State to exercise diplomatic protection does not prevent it from committing itself to its nationals to exercise such a right. In this context, the Working Group noted that some domestic laws have recognized the right of their nationals to diplomatic protection by their Governments;

(f) The Working Group believed that it would be useful to request Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection;

(g) The Working Group recalled the decisions by the Commission at its forty-ninth session, in 1997, to complete the first reading of the topic by the end of the present quinquennium.

109. As regards the second report of the Special Rapporteur, the Working Group suggested that it should concentrate on the issues raised in Chapter One, "Basis for diplomatic protection", of the outline proposed by the previous year's Working Group.

110. The Commission at its 2544th meeting, on 9 June 1998, considered and endorsed the report of the Working Group.

UNILATERAL ACTS OF STATES

A. Introduction

111. At its forty-ninth session, in 1997, the Commission decided to include in its agenda the topic "Unilateral acts of States".[100] The General Assembly endorsed the Commission's decision in paragraph 8 of its resolution 52/156. Also at its forty-ninth session, the Commission appointed Mr. V. Rodríguez-Cedeño Special Rapporteur for the topic.

B. Consideration of the topic at the present session

112. The Commission had before it the Special Rapporteur's first report on the topic.[101] The Commission considered the report at its 2524th to 2527th meetings, from 5 to 8 May 1998.

1. Introduction by the Special Rapporteur of his first report

113. The Special Rapporteur said that his first report was preliminary in nature, being in the manner of an introduction to the topic. It was his intention to submit a substantive report in time for the next session of the Commission. The current report reflected much of the doctrine, jurisprudence and State practice, as well as the comments which Governments had made in the previous year in the Sixth Committee. It was, moreover, based on the conclusions of the Working Group which the Commission had established at its preceding session.[102] The Special Rapporteur explained that his main objective in preparing the report had been to establish a systematic approach to the study of the topic, in keeping with the methodology which the Working Group had proposed.

114. The Special Rapporteur pointed out that the Permanent Court of International Justice and the International Court of Justice had on a number of occasions considered unilateral acts of States. Sometimes those courts had come

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[100] Official Records of the General Assembly, Fifty-second Session, Supplement No. 10 (A/52/10), para. 221.

[101] A/CN.4/486.

[102] Official Records of the General Assembly, Fifty-second Session, Supplement No. 10 (A/52/10), paras. 195-216.

to the conclusion, as in the Eastern Greenland[103] and Nuclear Tests[104] cases, that the unilateral acts before them were binding under international law, regardless of whether they could be considered to fall within the purview of the law of treaties. Sometimes, on the other hand, they had concluded that the acts in question were political in nature and devoid of legal force, as in the Frontier Dispute[105] and Military and Paramilitary Activities[106] cases. There could be no doubt, though, in the light of this jurisprudence - and, likewise, of State practice and doctrine - that unilateral acts did exist as a phenomenon of international law.

115. The Special Rapporteur was of the opinion that it would not be possible to embark upon the elaboration of rules of international law governing unilateral acts of States unless a definition of those acts was first properly established, or at least the elements of a definition identified.

116. That being so, the principal objective of his first report had been to arrive at a definition of a strictly unilateral act, with a view to facilitating the future preparation of more detailed reports setting out rules relating to the performance, formal validity, effects, interpretation, invalidity, duration, amendment and termination of such acts.

117. Insofar as the elements of a definition were concerned, the Special Rapporteur explained that he considered it necessary first to identify those acts which fell outside the scope of the topic and which should therefore be excluded from study.

118. It was necessary next, he said, to set out criteria for determining the category of acts which should be the subject of study by the Commission. In the opinion of the Special Rapporteur, such acts were those unilateral acts of States which were "strictly" or "purely" unilateral in nature. He explained that he had used this terminology in his report in order to distinguish the acts which he proposed for study from those unilateral acts which were of a

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[103] Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No. 53, pp. 22, 36-37, 57-58 and 69-73.

[104] Nuclear Tests (Australia v. France), Judgment of 20 December 1974, I.C.J. Reports 1974, p. 253, paras. 34-51; and Nuclear Tests (New Zealand v. France), Judgment of 20 December 1974, I.C.J. Reports 1974, p. 457, paras. 35-53. Subsequent references to specific paragraphs of these judgments are limited to the former of the two.

[105] Frontier Dispute, Judgment, I.C.J. Reports 1986, p. 554, paras. 38-40.

[106] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14, paras. 167-171 and 257-262.

non-autonomous or dependent nature and which should be excluded from study as being already governed by existing rules of international law.

119. With regard to the first of these tasks, the Special Rapporteur drew attention to the fact that he had singled out certain categories of unilateral acts for exclusion from the study, namely, unilateral political acts, unilateral legal acts of international organizations and those attitudes, acts and conduct of States which, though voluntary, were not performed with the intention of producing specific effects in international law.

120. Turning first to political acts, the Special Rapporteur stated that it was his view that they should be excluded from the scope of the study which the Commission was undertaking. An act might be characterized purely political, he suggested, if it gave rise solely to political effects and did not have any consequences at all in international law. It was, however, no easy matter to determine the nature of an act which was performed by a State. Indeed it was quite possible that an apparently political act, which had been performed outside the framework of international negotiations, entirely within a political context and without any of the formalities which were particular to an international legal act, might nevertheless be binding in international law upon the State that had performed it. Whether it was depended upon the intention of that State; and it would be for international courts and tribunals to determine what that intention had been. All this was clear from the judgments of the International Court of Justice in the Nuclear Tests cases of 1974.[107]

121. The Special Rapporteur added that unilateral acts of a purely political nature were a quite common phenomenon and were frequently of considerable significance in the conduct of international relations. By means of such acts, States might enter into political commitments which regulated their conduct at the international level; even though breach of those commitments did not give rise to responsibility under international law and might not attract any legal sanction, the political responsibility of the State would be at issue and its credibility and participation in international affairs affected. Certainly, purely political commitments could not be considered on a par with commitments of a legal nature, but they did share a common feature, insofar as both governed in a very real way the conduct of States in their international relations.

122. Insofar as the unilateral legal acts of international organizations were concerned, the Special Rapporteur suggested that they, too, should be considered as falling outside the bounds of the topic.

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[107] Op. cit. (see note 104 above), paras. 43-45, 48, 50 and 51.

123. The Special Rapporteur noted that there was an ever increasing body of practice relating to the acts of international organizations. Many of those acts took the form of resolutions, which could in turn be reduced to two basic types: recommendations and decisions. Those unilateral acts of the organization which took the form of decision-making resolutions, such as those relating to the operations of the organization or that were addressed to one of its subsidiary bodies, were legally binding. On the other hand, those which took the form of recommendations and were addressed to States were not binding in law. They were nonetheless often of great importance in the formation of rules of customary international law. Yet another category of the unilateral acts of international organizations was made up of those acts which were formulated by the highest administrative authority of the organization. These included not only acts of an internal nature, but also acts relating to one or more States or to the international community as a whole. In the view of the Special Rapporteur, moreover, it would be difficult to elaborate rules which were common to the unilateral acts of States and of international organizations.

124. The Special Rapporteur trusted that it would be clear from the brief account which he had given that the subject of the unilateral acts of international organizations was complex and that it required special consideration.

125. The Special Rapporteur proposed that there also be excluded from study those unilateral acts of States which gave rise to international responsibility, a topic which the Commission was already considering on the basis of the reports of Mr. Crawford and Mr. Rao.

126. Turning to chapter I of his report, the Special Rapporteur drew attention to the distinction which was there drawn between formal legal acts, on the one hand, and the legal rules that were created by means of those acts, on the other. It was his view that the Commission should focus on unilateral acts as formal legal acts, that is, as procedures or devices for the creation of legal rules, in particular for the creation of legal obligations for the States which were their authors. The content of the legal rules so created should be considered incidental to the Commission's study, he suggested.

127. The Special Rapporteur drew attention to the review of the various substantive legal acts of States which was to be found in chapter I of his report. That review had been made for the purpose of determining which acts fell within the sphere of the law of international agreements and which did not and so might be said to be in need of special rules to govern their operation.

128. Unilateral acts connected with the law of treaties, such as signature, ratification, the formulation of reservations and even the making of

interpretative declarations, clearly fell within the treaty sphere, being governed by the rules of the law of treaties, in particular the rules laid down in the Vienna Conventions of 1969 and 1986.

129. The Special Rapporteur proposed that the following unilateral acts should be excluded from the scope of the study: acts which contributed to the formation of custom; acts which constituted the exercise of a power conferred by a treaty or by a specific rule of customary law (for example, the proclamation of a State establishing a maritime zone off its coast); acts which did not consist in the exercise of pre-existing legal powers, but which represented the exercise of a freedom under international law (for example, the adoption of legislation making criminal certain activity which might be performed by foreigners abroad); and acts that created or gave rise to a treaty relationship (for example, offer and acceptance).

130. Turning to estoppel, the Special Rapporteur remarked that estoppel was a rule of evidence which had its origins in common law legal systems, but which had now found a place in the doctrine and jurisprudence of international law. However, while international courts had on a number of occasions considered the doctrine of estoppel, they had rarely relied upon it as a basis for their decisions (for example, the Corvaia case of 1903 between Italy and Venezuela[108]). The jurisprudence, moreover, had considered the doctrine of estoppel only in its restrictive form of estoppel by representation. That was apparent from such decisions as those in the Eastern Greenland,[109] North Sea Continental Shelf,[110] Temple of Preah Vihear,[111] Nottebohm,[112] Barcelona Traction[113] and Arbitral Award of the King of Spain[114] cases.

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[108] Corvaia Case, United Nations, Reports of International Arbitral Awards, vol. 10, p. 633.

[109] See note 103 above.

[110] North Sea Continental Shelf, Judgment I.C.J. Reports 1969, p. 3, paras. 27-33.

[111] Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962, pp. 27-33, especially p. 32.

[112] Nottebohm Case (second phase), Judgment of 6 April 1955, I.C.J. Reports 1955, pp. 17-20.

[113] Barcelona Traction, Light and Power Company Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964, pp. 24-25.

[114] Case concerning the Arbitral Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960, I.C.J. Reports 1960, especially pp. 209 and 210-213. Note also ibid., p. 214.

131. The Special Rapporteur said that estoppel did not constitute a phenomenon which was of direct concern to the study of unilateral acts. An estoppel involved acts or conduct by one State which gave rise to certain expectations on the part of another State, on the basis of which that other State had proceeded to adopt a course of action which was to its own detriment. Although the conduct of the State which was responsible for the representation might appear at first blush to have some similarity to a unilateral legal act, it was in fact of a quite different character. The conduct which gave rise to an estoppel could involve either a positive act or a passive attitude, such as silence. There was furthermore no necessity that that conduct should be performed with any intention to create legal effects. A true unilateral legal act, on the other hand, was a positive and formal legal act which was carried out precisely with the intention of giving rise to legal effects. Moreover, a unilateral legal act, such as a promise, placed the State which made it under a legal obligation immediately that that act was performed. In contrast, the most important element in an estoppel was the conduct of the State to which the representation was made, that is, the conduct in which that other State engaged in reliance upon the representation which had been made to it by the first State. In the case of an estoppel, then, the legal effect flowed not from the will of the State which made the representation, but from the reliance which was placed on that representation by the State to which it was made. The conduct of that other State was of fundamental importance. In the case of a unilateral legal act, on the other hand, such as a promise, the conduct of the beneficiary was, analytically speaking, not of any importance in determining its binding character, as the decisions of the International Court of Justice in the Nuclear Tests cases[115] made clear. The Special Rapporteur added that some writers took the view that, in the Barcelona Traction,[116] Serbian Loans[117] and North Sea Continental Shelf[118] cases, estoppel had been treated as a special means of establishing a treaty relationship. For that reason, too, it should be excluded from the scope of the study which the Commission was undertaking.

132. The Special Rapporteur also proposed the exclusion from study of certain other forms of conduct which were not formal legal acts, but which were

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[115] Op. cit., note 104, paras. 43 and 50.

[116] See note 113.

[117] Case concerning the Payment of Various Serbian Loans Issued in France, P.C.I.J., Series A, Nos. 20/21, pp. 37-39.

[118] See note 110 above.

nevertheless capable of generating effects in international law. That was the case, for instance, with silence, where a State failed to protest a legal claim which had been made against it. The Special Rapporteur explained that the failure of a State to protest a claim or a situation did not necessarily connote any intention on its part to create legal effects, specifically, to render that claim or situation opposable to itself. Furthermore, silence was not a strictly or purely unilateral act for it could not, by itself, have any legal effect or create any new legal relationship, since it necessarily presupposed for its effectiveness the performance of some prior act or conduct on the part of another State, to which it could be considered a response.

133. The Special Rapporteur stated that, in his view, similar considerations applied to notification. Regardless of whether or not it was a legal act, notification was incapable of producing legal effects by itself. Rather, it presupposed for its effectiveness the performance of another act by some other subject of international law.

134. Turning to chapter II of his report, the Special Rapporteur explained that it dealt with the criteria which he considered to determine the strictly unilateral nature of a legal act.

135. In his opinion, a strictly unilateral act was a single expression of the will of one or more States. Unilateral acts, then, could be either individual or collective in nature.

136. The Special Rapporteur pointed out that in his report he had described such acts as "heteronormative", since they produced legal effects in respect of subjects of international law which had not participated in their performance. That criterion, however, was insufficient, in his view, to distinguish those acts which were purely or strictly unilateral in character. For that purpose it was necessary to think in terms not only of the single attribution of the act, but also of its autonomy. In order to be classified as strictly unilateral, an act had to be self-sufficient in generating legal consequences, that is, it had to produce legal effects independently of any other manifestation of will, whether prior, simultaneous or subsequent, by some other subject of international law. If it were not so independent in generating legal effects, it would not be truly unilateral in character, but would fall into the treaty sphere.

137. The Special Rapporteur suggested that the autonomy of the obligation which was created by a unilateral act was a decisive criterion in establishing its strictly unilateral nature. Any legal act created rights and obligations; and a unilateral act naturally created an obligation for the State which performed it and a right in favour of one or more States which were strangers to its

performance. However, in the case of strictly unilateral acts, the obligation arose neither when that obligation was accepted nor at the time that the State which was the beneficiary of that obligation subsequently engaged in any particular form of conduct. Rather, it arose when the State which performed the unilateral act intended that it should arise. A State was able to assume an obligation in this way by exercising the power of auto-limitation which was conferred upon it by international law.

138. The Special Rapporteur pointed out that there were important practical consequences to the autonomy of the obligation which was created by means of a strictly unilateral act. When an international court or tribunal considered whether an act was strictly unilateral, it would examine the formulation of that act and not the conduct of the State in respect in which it was performed and which it vested with legal rights. The same would be true when a court or tribunal turned to determining the precise legal effects of a strictly unilateral act.[119]

139. The Special Rapporteur pointed out that chapter II also considered the legal basis of the binding nature of unilateral acts of States. Under the law of treaties, every treaty had to be performed in good faith. Given the need for mutual trust, confidence and security in international relations and for international legal certainty, good faith also had to be regarded as fundamental to the binding nature of unilateral acts of States.[120]

140. The Special Rapporteur suggested that the binding nature of strictly unilateral acts might also be explained by reference to the power of auto-limitation which States enjoyed under international law, in other words, their ability in the exercise of their sovereignty to subject themselves to international legal obligations. Such obligations need not necessarily be subject to the principle of reciprocity and so might be entirely unilateral in form and autonomous in nature. Accordingly, the binding nature of a unilateral legal act of a State might be said to be based on the intention of the State that performed it, and not on any legal interest which some other State might have in the performance of the obligations which it purported to create.

141. The Special Rapporteur went on to recall that the principle pacta sunt servanda was the basis of the binding nature of treaties, as was apparent from article 26 of the Vienna Convention on the Law of Treaties of 1969. He suggested that a parallel principle, such as promissio est servanda, could be

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[119] See the Nuclear Tests cases (note 104 above), paras. 44, 45, 50 and 51.

[120] Ibid., para. 46. Note also ibid., para. 51.

said to found the binding character of unilateral acts of promise. Appeal might also be made to broader principles, such as acta sunt servanda or, for unilateral declarations, declaratio est servanda.

142. On the basis of the above considerations, the Special Rapporteur placed before the Commission in paragraph 170 of his report the component parts of a definition of a unilateral act for the purposes of the study on which the Commission was embarked. As stated therein, a strictly unilateral declaration could be regarded as an autonomous expression of clear and unambiguous will, explicitly and publicly issued by a State, for the purpose of creating a juridical relationship - in particular, of creating international legal obligations - between itself and one or more States which did not participate in its elaboration, without it being necessary for those States to accept it or subsequently to behave in such a way as to signify such acceptance.

143. The Special Rapporteur pointed out that this definition was limited to unilateral declarations and that unilateral acts which did not take that form were excluded from its scope. In explanation of this limitation, the Special Rapporteur stated that it was his view that the unilateral declaration was the basic instrument which States employed in order to accomplish the transactions which they chose to effect by means of unilateral acts. In other words, the unilateral declaration was to the law of unilateral acts what the treaty was to international treaty law. That being so, any final document which the Commission might adopt on the topic of unilateral acts of States should be limited to those unilateral acts which were also unilateral declarations.

144. In conclusion, the Special Rapporteur remarked that it was clear that unilateral acts of States did exist in international law. Moreover, it was clear that certain of such acts were truly autonomous, in the sense that they were strictly unilateral in nature, their effectiveness in law not being conditional upon the occurrence of any other manifestation of will. The consideration of such acts by the Commission was both of practical interest and of considerable political relevance, since States were increasingly resorting to their performance in the conduct of their international relations.

145. If it was considered possible and advisable to undertake the elaboration of rules governing the functioning of unilateral declarations, the Special Rapporteur suggested that the Commission reconstitute the working group which had been established at its previous session in order to consider the scope and content of the work that lay ahead.

2. Summary of the debate

146. The members of the Commission commended the Special Rapporteur on his report. It was said that the topic was an important one. It was also one of the most difficult topics that the Commission had addressed to date.

(a) General observations

147. During the course of the debate, certain members voiced doubts as to whether it was possible in international law for a unilateral act of a State by itself to effect an alteration in the legal relations between that State and some other State which had not participated in its elaboration. Either the agreement of that other State was necessary, or at least the performance by it of some kind of act in response to, or in reliance on, the unilateral act concerned.

148. Other members, however, pointed out that the doctrine of unilateral acts had solid foundations in the doctrine of international law, in the jurisprudence of the International Court of Justice and in the practice of States. It was also observed that the General Assembly had presupposed the existence of such a doctrine when, in its resolution 52/156 of 15 December 1997, it had endorsed the decision which the Commission had taken at its previous session to study the subject. Certain members observed in this connection that States sometimes had doubts as to the binding character of specific unilateral acts which had been performed in their favour by other States. It was also remarked that States preferred to have transactions which were effected in their favour by means of unilateral acts reduced into treaty form, if at all possible. Nevertheless, they certainly recognized and accepted that unilateral acts were capable, by themselves, of giving rise to legal effects under international law.

149. Insofar as concerned the relationship of unilateral acts to the sources of international law enumerated in Article 38 of the Statute of the International Court of Justice, one member was of the opinion that, although no explicit reference to unilateral acts appeared in that provision, they were nonetheless included by implication within the scope of paragraph 1 (b). Other members, however, considered that that paragraph did not contain any reference, even implicit, to unilateral acts. At the same time, certain members observed that Article 38, paragraph 1, of the Statute of the Court was not an exhaustive list of the sources of international law and that, notwithstanding their omission, unilateral acts definitely constituted one of those sources. Certain other members, on the other hand, agreed with the Special Rapporteur that unilateral acts represented a source not of international law, but of international obligations. One member, however, said that a distinction between sources of international law and sources of international obligations was illusory; while

another remarked that the question whether unilateral acts constituted a source of international law required further consideration.

150. With respect to the basis of the binding nature of unilateral acts under international law, several members expressed the view that it was to be found in the principle of good faith, as well as in the desirability of promoting conditions of security, confidence and trust in international relations. Reference was made in support of this view to the judgments of the International Court of Justice in the Nuclear Tests cases of 1974.[121] It was accordingly said not to be necessary to have recourse to the elaboration of a principle which was proper to unilateral acts, such as acta sunt servanda, promissio est servanda or declaratio est servanda. While agreeing with this conclusion, one member stated that the source of the binding nature of unilateral acts resided, rather, in the sovereignty of States.

(b) Scope of the topic

151. While a number of members stated that it was necessary to identify or to establish limits for the topic, it was at the same time remarked that these limits should not be overly narrow or restrictive. Conversely, it was pointed out that there was no necessity for the Commission to undertake the examination of every type of act which might fall within the scope of the topic and that the Commission might quite properly decide to select just some of them for study.

152. As far as the limits suggested by the Special Rapporteur were concerned, several members were of the view that, in proposing that the Commission confine its study to strictly or purely unilateral acts, he had, generally speaking, set boundaries for the topic which were too narrow.

153. Turning to the Special Rapporteur's suggestions as to the particular categories of acts which should be excluded from the scope of the topic, although there was general agreement that unilateral acts of international organizations fell outside its ambit, certain members considered that reference might usefully be made to such acts in order to assist in the analysis of the unilateral acts of States. It was pointed out, however, that such reference should be limited to the external acts of international organizations and should not extend to their internal acts.

154. There was general agreement with the Special Rapporteur's suggestion that unilateral acts of States which were possessed solely of political consequences fell outside the boundaries of the topic.

155. With regard to the distinction between unilateral "legal" acts and unilateral "political" acts, it was generally acknowledged that it was often

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[121] See note 104 above.

difficult to determine into which category a particular act fell. According to one point of view, the answer turned upon the intention of the State performing the act. However, it was also said that, while the expressed or evident intention of the author of the act was certainly determinative, it was at the same time entirely possible that a unilateral act, including a promise, might be legally binding or productive of legal consequences in the absence of any clear evidence that it had been the intention of the author State that it be so.

156. There was general agreement with the Special Rapporteur's view that, insofar as a unilateral act of a State might be contrary to its obligations under international law and give rise to international responsibility, it should not be the subject of study by the Commission in the context of the present topic. There was also general agreement with his view that unilateral acts which came within the ambit of the law of treaties - such as signature, ratification, denunciation and the formulation of a reservation - lay beyond the topic's bounds. Insofar as a unilateral act contributed to the formation of a rule of customary international law, there was, once more, agreement that it did not come within the bounds of the topic. A similar view was expressed with regard to unilateral acts which constituted the exercise of a competence conferred by a particular rule of customary law or by a treaty, such as an act of a State establishing a maritime zone. (Mention was also made in this regard of declarations accepting the compulsory jurisdiction of the International Court of Justice pursuant to Article 36, paragraph 2, of the Statute of the Court. There was agreement, too, that unilateral acts which were solely internal in nature and effect, including those which were adopted in implementation of the international obligations of a State, were beyond the bounds of the topic.

157. However, differing views were expressed as to whether the Commission should study the silence of a State inasmuch as that silence might bring about an alteration of the position of the State under international law or cause some legal situation to become opposable to it. While some members of the Commission agreed with the Special Rapporteur's view that the topic should be excluded, other members were of the opinion that the Commission should undertake the study of silence and acquiescence. Insofar as they were generative of legal effects under international law, these were important phenomena which, if only for practical reasons, it would be difficult to exclude from study. Alternatively, it was said that, while it was not a legal act in the strict and formal sense of those words, silence could be considered a unilateral act, to an extent at least, since it could be viewed as an expression of intention on the part of the State concerned to assume legal obligations or to accept a juridical situation with which it was faced. One member emphasized in this connection that the

Commission should study not only those cases of silence which involved inaction on the part of a State which was confronted with a claim or situation, but also those cases in which that State engaged in conduct from which its acceptance of that claim or situation could be implied.

158. A broadly similar range of opinions was expressed with regard to estoppel.

159. On the one hand, agreement was expressed with the view of the Special Rapporteur that estoppel should not be the subject of study by the Commission. By way of explanation it was said that, for there to be an estoppel, it was necessary that one State perform an act or engage in certain conduct and that another State perform an act or engage in certain conduct in response. The first act or conduct could not, by itself and without the second, give rise to any legal consequences. That being so, estoppel ought not to be the subject of study within the framework of the current topic. It was also said that an estoppel did not necessarily require the performance of an act which was intended to generate legal effects and, on that account also, should not be the object of study by the Commission.

160. On the other hand, it was said that there was a developed body of jurisprudence on the subject of estoppel, that the doctrine was of considerable importance in the practice of international law and that it should accordingly, if only for practical reasons, be included within the scope of the study which the Commission was undertaking. Even if the focus of the study were limited to autonomous unilateral acts, that is, to acts which were self-sufficient in generating legal consequences, an exception might be made in respect of estoppel for these reasons. Moreover, examination of the doctrine of estoppel might be useful to the Commission in gaining a fuller view of those forms of unilateral act which did undoubtedly fall within the parameters of the topic.

161. Insofar as concerned unilateral statements which were made by the agent of a State in the course of proceedings before an international court or tribunal, certain members voiced disagreement with the view of the Special Rapporteur and suggested that such statements should be studied by the Commission. It was pointed out in this regard that certain of the judicial decisions and arbitral awards which were frequently cited in the literature of unilateral acts related to acts of this very type.

162. One member expressed the view, contrary to that of the Special Rapporteur, that acts of notification should be included within the scope of the study.

163. A view was also expressed favouring the study of those unilateral acts which might serve as evidence of the attitude of a State regarding some other act or some fact or situation.

164. Turning to the acts which the Special Rapporteur had enumerated in his report as falling within the scope of the topic, there was general agreement that the study should encompass unilateral acts of promise, recognition, renunciation and protest. One member was also of the view that the Commission should undertake the study of acts of waiver.

(c) Definition and elements of unilateral acts

165. With regard to the Special Rapporteur's suggestion that the Commission should first attempt to draft a definition of a unilateral act, a range of views was expressed.

166. On the one hand, it was said that such an exercise was crucial in order to establish the boundaries of the topic and determine the proper range of the Commission's work. At the same time, it was remarked that any definition which might be drawn up should not be taken too strictly, nor should it be understood to fix the parameters for the topic in a rigid or inflexible way. Rather, it should be used to help orient the Commission's work and establish its focus. Certain members stated in this connection that the definition proposed by the Special Rapporteur in paragraph 170 of his report could be used by the Commission as a starting point for its work.

167. On the other hand, doubts were expressed as to the wisdom, and even the feasibility, of attempting a definition of a "unilateral act". It was observed that unilateral acts of States were so diverse in their nature that it was difficult to identify any consistency to the subject. It was accordingly to be doubted whether the topic was a unified subject which would admit of a single, all-embracing definition of the acts which it might be understood to embrace. Rather, the topic should be conceived as compartmentalized in nature and as comprising various types or categories of unilateral acts which varied one from another in terms of their properties and characteristics. Any definition which tried to transcend these categories would have to be set at too high a level of abstraction for it to be of any use. Alternatively, it was inevitable that any definition would be incomplete and that it would omit certain unilateral acts from its scope. According to this point of view, it would be better simply to identify certain categories of acts which it was agreed should be the subject of study and to proceed directly to the consideration of the rules which were proper to each of them.

168. Turning to the elements of the definition of a unilateral act which were proposed by the Special Rapporteur, certain members concurred with his suggestion that the Commission should focus on unilateral declarations. While acknowledging that declarations constituted the core of the topic, certain other members considered that the Commission should be prepared also to consider

other, less formal ways in which a State might bind itself unilaterally. (Specific mention was made in this connection of silence and acquiescence and of estoppel.) Other members disagreed with this approach, pointing out that the topic which the General Assembly had requested the Commission to study was "unilateral acts of States" and not "unilateral declarations". That being so, the Commission should examine those unilateral acts of a State which did not involve the making of a declaration, just as much as it should study unilateral declarations. It should also examine unilateral acts which constituted a course of conduct. It was noted in this connection that acts of a State which were not couched in the form of a declaration might give rise to effects which were identical with those arising from a declaration, for example, acts constituting implicit recognition.

169. Several members of the Commission agreed with the Special Rapporteur's suggestion that a unilateral act should involve a clear expression of the will or intention on the part of its author to create legal effects or to alter its juridical situation under international law. Others disagreed, arguing that while it might be necessary in the case of certain types of unilateral acts for there to be an intention on the part of their authors that they produce legal effects, this was not so in respect of others. Indeed, the jurisprudence suggests that States could perform a unilateral act without realizing it. An international tribunal might, for example, find that a unilateral declaration which contained a promise was binding upon its author under international law even though that State might maintain that it had had no intention to assume any such obligation when it performed that act.

170. Reflecting this divergence of views, differing views were also expressed regarding the usefulness of the concept of legal act which was proposed by the Special Rapporteur.

171. With regard to the element of publicity which the Special Rapporteur had suggested was a defining feature of a unilateral act, the view was expressed that, while this factor had been stressed in some of the jurisprudence, at least one judicial decision indicated that it was not a precondition to the legal effectiveness of a unilateral act and that a unilateral promise, for example, could legally commit the State that made it notwithstanding that it was given behind closed doors. The publicity of a unilateral act was relevant to proof of its existence and of the intention with which it was performed, as well as to the identification of its beneficiaries, it was said. On the other hand, the view was expressed that, in order to effect an alteration in the juridical situation of the State that performed it vis-à-vis another State, a unilateral

act had to be made known to that other State. This was what was connoted by the suggested element of publicity.

172. Insofar as concerned the Special Rapporteur's suggestion that the scope of the study should be limited to autonomous unilateral acts - that is, to those unilateral acts which were capable by themselves of producing legal effects under international law and which did not depend for this purpose either upon the performance of another act by some other State or else upon its failure to act - different views were expressed.

173. Several members of the Commission were of the view that the Commission should indeed limit its work to unilateral acts of this type.

174. Certain members observed that, notwithstanding their ability themselves to alter the juridical relations of those States that performed them, such acts might provoke reactions on the part of other States. These reactions should not be ignored when it came to determining the legal effects which might be attributed to the acts concerned. This was all the more so inasmuch as these reactions might even affect the classification of the acts concerned as unilateral. To this extent, it was said that the Commission could not avoid considering the phenomenon of offer and acceptance. Unilateral acts were frequently, if not generally, performed within the context of international negotiations. In fact, it was rare to encounter a unilateral act which had not been solicited by some other State, or which had not been made in response to some statement or conduct on the part of another State. The view was expressed that this background in international negotiations was significant for the proper analysis of unilateral acts.

175. It was also said that it was not self-evident that the self-sufficiency of an act in generating legal consequences should be a crucial factor in determining whether or not it should be the subject of study within the context of the current topic. There were certain types of act which were not autonomous in the sense in which that word had been used by the Special Rapporteur, but which were nonetheless generally considered by practitioners to belong to the sphere of unilateral acts and whose study, in view of their practical and theoretical importance, there was good reason for the Commission to undertake.

176. Other members of the Commission were of the view that, while autonomous unilateral acts should be the main focus of the study, the Commission should at the same time be prepared to go beyond such acts and to undertake the examination of at least certain of those unilateral acts which were not capable by themselves of producing legal effects. Particular mention was made in this regard of estoppel and of silence and acquiescence.

(d) Approach to the topic

177. Several members expressed agreement with the suggestion of the Special Rapporteur that the Commission should focus its attention upon the unilateral act as a "formal" act - that is, upon the unilateral act as an instrument or procedure for bringing about legal consequences (*instrumentum*) - rather than upon the "substantive" act - that is, upon the legal transaction or operation which a unilateral act might be used to effect (*negotium*). Other members were of the view that it was not possible to make a distinction between the formal act and the substantive act in the manner proposed by the Special Rapporteur. The act and the legal transaction which it effected were indissociable, the former having no legal meaning independently of the latter.

178. On one view, the differences which might exist between the different types of transaction which could be effected by means of a unilateral act were not such as to prevent the elaboration of a single law of unilateral acts, just as the differences which existed between international agreements had not prevented the codification of a single law of treaties. According to this view, the Commission should confine itself to identifying and setting out rules which were applicable to unilateral acts in general, whatever the transaction might be that they might effect.

179. Several members were of the opinion that the approach suggested by the Special Rapporteur was not well founded, inasmuch as it assumed that the topic of unilateral acts was unitary in nature and that it was possible to subject unilateral acts to a single body of rules regardless of the type of transaction which they were used to effect. The same question - for example, the circumstances, if any, in which an act was capable of revocation - had a different practical meaning or significance depending upon the particular category of act which was the subject of consideration - a promise, for example, or an act of recognition or a protest. It therefore hardly admitted of the same answer in each case. According to this point of view, the Commission should not attempt to deal with the topic as a single whole or to elaborate rules which were meant to apply to all those forms of unilateral act which fell within its scope. This would only lead inevitably to the articulation of rules which were pitched at too high a level of abstraction to be useful. Rather, the Commission should proceed to a staged consideration, one by one, of the categories or types of unilateral act which it might decide to address and to the identification of the rules and the elucidation of the issues which were proper to each. Alternatively, it was said that, while it might be possible to identify certain rules which were common to all unilateral acts, there were also rules which were

particular to each category of unilateral act and these, too, should be the subject of study by the Commission.

180. Certain members expressed doubts as to whether any of these approaches to the topic was feasible. As they saw it, there were certain domains of international law in which the rules relating to unilateral acts were well established. An attempt might certainly be made to extrapolate from the law in these domains and to set out rules which were applicable to unilateral acts in general. However, it was to be doubted whether this would prove possible. Instead, it was probably the case that, as one moved from one substantive branch of international law to another, the rules which regulated the conditions and effects even of those unilateral acts which effected the same kind of transaction varied and changed. The most that the Commission could do, then, was to undertake the elaboration of rules on unilateral acts in particular substantive fields of international law, such as the law of armed conflict, the law of nuclear energy, the law of the environment and so on.

181. Insofar as concerned the materials on which the Commission should rely in elaborating the law of unilateral acts, one member remarked that the law in the field was largely based on a handful of judicial decisions, which were, moreover, quite confusing in the picture that they presented. The Commission would have to subject these cases to careful analysis in order to make sense of the law. While acknowledging that analysis of the jurisprudence would indeed be necessary, several members remarked that the law of unilateral acts was based not just on case law, but also on a considerable body of State practice, which also predated the modern and more well-known decisions in the field. This, too, would need to be examined. Furthermore, while the manner in which the law had been applied to the facts in some of those modern decisions had been criticized, those decisions formed part of the jurisprudence regarding unilateral acts and States now relied upon the law as it was there set forth. It would not be right, then, to cast doubt upon the value of those decisions as precedents. Mention was also made by several members of the rules of the law of treaties, which should prove of considerable use in elaborating rules on analogous issues in the law of unilateral acts.

182. In this connection, the suggestion was made that the Secretariat might make available to the Commission at its next session a compilation of relevant excerpts from all of those decisions of the International Court of Justice which were relevant to the study of the topic. It was also suggested that members of the Commission might provide the Special Rapporteur with pertinent examples drawn from the national practice of their State of origin.

183. Notwithstanding the existence of these various sources, it was observed by certain members that there did not yet exist any coherent theory of unilateral acts and that the work of the Commission would accordingly partake more of the nature of progressive development than of straightforward codification.

184. Several members made references to the particular questions or issues which the Commission should address in elaborating the law of unilateral acts of States. Specific mention was made of the rules governing the imputation of unilateral acts to States, the conditions which needed to be fulfilled in order for a unilateral act of a State to exist, including any requirements of form which there might be, the rules governing the interpretation of unilateral acts, the effects of unilateral acts, including rules determining the identification of the State or States whose legal relations with the author State were altered or affected by the act, the rules regulating the validity of unilateral acts and the circumstances and manner in which they might be modified, terminated or revoked. Mention was also made, in respect of silence and estoppel, of the definition of the circumstances which a State needed to create, for the silence or representation of another State to give rise to legal effects; and, with regard to protest, it was said that the Commission would need to clarify the circumstances in which it was helpful for a State to make a protest.

185. A number of members made observations regarding the problem of the revocation of unilateral promises. Some remarked that the ability of a State to revoke a unilateral promise which it had made should depend, at least in part, upon its intention when it performed that act. Thus, if it had intended that its promise be revocable, then it should be susceptible of revocation, subject to whatever conditions or restrictions that State might have imposed upon itself in that regard. Reference was made in support of this conclusion to the decision of the International Court of Justice in the jurisdictional phase of the case concerning Military and Paramilitary Activities in and against Nicaragua.[122] Conversely if the State which had made the promise had intended that it be irrevocable, then it should not, in principle, be subject to revocation. With regard to those cases in which it was not possible to identify any intention on the part of the declarant State, one member expressed the view that, since the legal relations created by a unilateral promise were not reciprocal in nature, such a promise should be presumed to be revocable at will by the State which had made it.

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[122] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 418.

186. Several members, however, were opposed to this conclusion, remarking that, were this so, the binding nature of such acts under international law would be quite illusory and the expectations of those States in whose favour they were made would lack protection. On the other hand, it was observed that, were unilateral promises to be presumed to be of indefinite duration and not to be susceptible of revocation without the consent of the State or States in whose favour they were made, then States would be reluctant ever to make such promises. Alternatively, they would find themselves compelled in certain circumstances to resile from them. Accordingly, there should be some, albeit not unlimited, ability on the part of a State which had made such a promise to revoke it.

187. The suggestion was made in this connection that guidance on the subject might be sought in the general rules of the law of treaties. The International Court in the jurisdictional phase of the Nicaragua case[123] had used analogies drawn from that field in order to analyse the question of the withdrawal and modification of unilateral declarations which had been made under Article 36, paragraph 2, of the Statute of the Court. In the same vein, it was suggested that reference should be made to the rules set out in articles 34 to 37 of the Vienna Convention on the Law of Treaties of 1969, in particular to article 37, paragraph 2.

(e) Final form of the Commission's work

188. Several members agreed with the Special Rapporteur that it was premature to decide what form should be given to the Commission's work on the topic. At the same time, a number of opinions were voiced on the matter, it being remarked that the issue should not be postponed, since the form which was chosen would influence the way in which the Commission carried out its work.

189. On the one hand, several members said that the Commission's work should probably, or at least might conceivably, take the form of draft articles with commentaries. Such a form of output would be helpful in generating greater stability and security in international relations. Other members, however, considered that it would be difficult to codify the law on the topic in such a way and that to attempt to do so might lead the Commission into problems and even prove unhelpful to States. In particular, such a form of output could well restrict diplomats' freedom of manoeuvre and reduce the flexibility of what was an important device in the conduct of international relations whose most useful characteristic was its lack of formality. Certain of those who expressed this view did not exclude the possibility that the Commission might ultimately

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[123] Ibid.

produce draft articles on the topic, but considered that it should not embark on such an enterprise as yet and that, initially at least, it should confine itself to studying the topic in greater detail or else should aim at some other form of output.

190. On the other hand, it was said by a number of members that the Commission's work, either initially or finally, should take the form of an expository study. Other members, however, remarked that the mission of the Commission was not a doctrinal one.

191. Yet another view was that the Commission's work might take the form of guidelines.

3. Establishment of a working group

192. At its fiftieth session, the Commission had before it the first report of its Special Rapporteur, Mr. Víctor Rodríguez-Cedeño (A/CN.4/486), and considered it at its 2534th to 2537th meetings, from 5 to 8 May 1998.

193. As a result of its discussion, the Commission, at its 2537th meeting, decided to reconvene the Working Group on Unilateral Acts of States.[124]

194. The Working Group held two meetings, on 18 and 19 May 1998. As regards scope of the topic, there was general endorsement of the approach taken by the Special Rapporteur in his report, which concurred with the outline adopted by the Commission at its previous session, and which limited the topic to unilateral acts of States issued for the purpose of producing international legal effects. This excluded from the topic's scope acts of States which do not produce legal effects, unilateral acts of the State which are linked to a specific legal regime and acts of other subjects of international law, such as acts of international organizations.

195. Opinions differed as to whether the scope of the topic extended to unilateral acts of States issued in respect of subjects of international law other than States or erga omnes, and on whether, under the present topic, the effects of unilateral acts issued in respect of States could also be extended to other subjects of international law. It was felt, however, that at the current stage, work could proceed without making a final decision on the matter, subject to further examination of the question by the Special Rapporteur and the Commission in plenary and its further clarification in due course.

196. As to the form which the work of the Commission on the topic should adopt, it was generally felt that the elaboration of possible draft articles with commentaries on the matter was the most appropriate way to proceed. This would ensure the advantages of conciseness, clarity and systematization of a

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[124] For the composition of the Working Group, see para. 8 above.

codification exercise, without necessarily prejudging on the final legal status which might be reserved for such draft articles, namely, a convention, guidelines, restatement or any other outcome.

197. Taking into account the discussion in plenary as well as in the Working Group, it was felt that the Special Rapporteur might already be in a position to produce a number of draft articles: one, on scope, stating that the draft articles would apply to unilateral acts of States; another draft article, on use of terms, stating that a unilateral act [declaration] is an autonomous [unequivocal] and notorious expression of the will of a State which produces international legal effects; and another draft article, laying down that the fact that the draft articles did not apply to unilateral acts of the State which are linked to a pre-existing international agreement, such as, for instance, acts governed by the law of treaties, by the law of the sea, by the law of international arbitral or judicial procedure or by other specific legal regimes, or to acts of subjects of international law other than the State, was without prejudice to the application to them of any of the rules set forth in the draft articles to which they would be subject under international law, independently of the draft articles.

198. It was also generally agreed in the Working Group that the elaboration of aspects related to the element of the above definition consisting in the "purpose of producing legal effects" was well within the topic but pertained also to some other section of the draft articles, such as the effects of unilateral acts. This would cover the study of possible effects of the act, such as the creation of international obligations for the State issuing the act (namely, promise), the renunciation of its rights and the declaration of opposability or non-opposability to it of the claim of another State or of a particular legal situation (namely, recognition or protest). It would also cover the question whether it would be necessary, in order for the act to produce legal effects, for the addressee to accept it or subsequently behave in such a way as to signify such acceptance.

199. It was also felt that, taking into account the views expressed in plenary, the question of estoppel and the question of silence should be examined by the Special Rapporteur, at the appropriate time, with a view to determining what rules, if any, could be formulated in this respect, in the context of the unilateral acts of States.

200. As regards the future work of the Special Rapporteur, the Working Group recommended that the Commission could request the Special Rapporteur, when preparing his second report, to submit draft articles on the definition of unilateral acts and the scope of the draft articles, taking as a basis the

considerations contained in the present report of the Working Group. He could also proceed further with the examination of the topic, focusing on aspects concerning the elaboration and conditions of validity of the unilateral acts [declarations] of States, including, inter alia, the question concerning the organs competent to commit the State unilaterally on an international plane and the question concerning possible grounds of invalidity concerning the expression of the will of the State.[125]

201. At its 2543rd meeting, on 8 June, the Commission considered and endorsed the report of the Working Group.

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[125] The Working Group also considered whether the topic should be confined to the study of unilateral declarations of States. While some members were in favour of limiting the scope of the topic to declarations, as proposed by the Special Rapporteur in his first report, others were of the view that the scope of the topic was broader than declarations and should encompass other unilateral expressions of the will of the State under the general label of unilateral acts.

CHAPTER VII

STATE RESPONSIBILITY

A. Introduction

202. At its first session, in 1949, the Commission selected State responsibility among the topics which it considered suitable for codification. In response to General Assembly resolution 799 (VIII) of 7 December 1953 requesting the Commission to undertake, as soon as it considered it advisable, the codification of the principles of international law concerning State responsibility, the Commission, at its seventh session in 1955, decided to begin the study of State responsibility and appointed F. V. Garcia Amador as Special Rapporteur for the topic. At the next six sessions of the Commission, from 1956 to 1961, the Special Rapporteur presented six successive reports dealing on the whole with the question of responsibility for injuries to the persons or property of aliens.[126]

203. The Commission, at its fourteenth session, in 1962 set up a subcommittee whose task was to prepare a preliminary report containing suggestions concerning the scope and approach of the future study.[127]

204. At its fifteenth session, in 1963, the Commission, having unanimously approved the report of the subcommittee, appointed Mr. Roberto Ago as Special Rapporteur for the topic.

205. The Commission, from its twenty-first (1969) to its thirty-first sessions (1979), received eight reports from the Special Rapporteur.[128]

206. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic of "State responsibility" envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the

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[126] Yearbook ... 1969, vol. II, p. 229.

[127] Ibid., p. 229 et seq.

[128] For the eight reports of the Special Rapporteur see: Yearbook ... 1969, vol. II, doc. A/CN.4/217 and Add.1, pp. 125-156; Yearbook ... 1970, vol. II, doc. A/CN.4/233, pp. 177-198; Yearbook ... 1971, vol. II (Part One), doc. A/CN.4/246 and Adds.1-3, p. 199; Yearbook ... 1972, vol. II, doc. A/CN.4/264 and Add.1, p. 71; Yearbook ... 1976, vol. II (Part One), doc. A/CN.4/291 and Add.1 and 2, pp. 3-55; Yearbook ... 1977, vol II (Part One), doc. A/CN.4/302 and Add.1-3; Yearbook ... 1978, vol. II (Part One), doc. A/CN.4/318 and Add.1-4 and Yearbook ... 1980, doc. A/CN.4/318/Add.5-7.

settlement of disputes and the implementation of international responsibility.[129]

207. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility".[130]

208. At its thirty-first session (1979), the Commission, in view of the election of Mr. Ago as a judge of the International Court of Justice, appointed Mr. Willem Riphagen Special Rapporteur for the topic.

209. The Commission, from its thirty-second (1980) to its thirty-eighth sessions (1986), received seven reports from Mr. Willem Riphagen,[131] for Parts Two and Three of the topic.[132]

210. At its thirty-ninth session, in 1987, the Commission appointed Mr. Gaetano Arangio-Ruiz as Special Rapporteur to succeed Mr. Willem Riphagen, whose term of office as a member of the Commission had expired on 31 December 1986. The Commission, from its fortieth (1988) to its forty-eighth (1996) sessions, received eight reports from Mr. Arangio-Ruiz.[133]

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[129] Yearbook ... 1975, vol. II, pp. 55-59, doc. A/10010/Rev.1, paras. 38-51.

[130] Yearbook ... 1980, vol. II, (Part Two), pp. 26-63, doc. A/35/10, chap. III.

[131] For the seven reports of the Special Rapporteur, see Yearbook ... 1980, vol. II (Part One), p. 107, doc. A/CN.4/330; Yearbook ... 1981, vol. II (Part One), p. 79, doc. A/CN.4/334; Yearbook ... 1982, vol. II (Part One), p. 22, doc. A/CN.4/354; Yearbook ... 1983, vol. II (Part One), p. 3, doc. A/CN.4/366 and Add.1; Yearbook ... 1984, vol. II (Part One), p. 1, doc. A/CN.4/380; Yearbook ... 1985, vol. II (Part One), p. 3, doc. A/CN.4/389; and Yearbook ... 1986, vol. II (Part One), p. 1, doc. A/CN.4/397 and Add.1.

[132] At its thirty-fourth session (1983), the Commission referred draft articles 1 to 6 of Part Two to the Drafting Committee. At its thirty-seventh session (1985), the Commission decided to refer articles 7 to 16 of Part Two to the Drafting Committee. At its thirty-eighth session (1986), the Commission decided to refer draft articles 1 to 5 of Part Three and its annex to the Drafting Committee.

[133] For the eight reports of the Special Rapporteur, see Yearbook ... 1986, vol. II (Part One), p. 6, doc. A/CN.4/416 and Add.1; Yearbook ... 1990, vol. II (Part One), doc. A/CN.4/425 and Add.1; Yearbook ... 1991, vol. II (Part One), doc. A/CN.4/440 and Add.1; doc. A/CN.4/444 and Add.1-3; doc. A/CN.4/453 and Add.1 and Corr.1-3 and Add.2 and 3; doc. A/CN.4/461 and Add.1 and 2; doc. A/CN.4/469 and Corr.1 (English only) and Add.1 and 2 and A/CN.4/476 and Corr.1 (English only) and Add.1. At its forty-first session (1989), the Commission referred to the Drafting Committee draft articles 6 and 7 of Chapter Two (legal consequences deriving from an international delict) of Part Two of the draft articles. At its forty-second session (1990), the Commission referred draft articles 8, 9 and 10 of Part Two to the Drafting Committee. At its forty-fourth session (1992) the Commission referred to the Drafting Committee draft articles 11 to 14 and 5 bis for inclusion in Part Two of the draft articles. At

211. At the conclusion of its forty-seventh session, the Commission had provisionally adopted, for inclusion in Part Two, draft articles 1 to 5[134] and articles 6 (Cessation of wrongful conduct), 6 bis (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction), 10 bis (Guarantees of non-repetition),[135] 11 (Countermeasures by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures).[136] It had furthermore received from the Drafting Committee a text for article 12 (Conditions relating to resort to countermeasures), on which it deferred action.[137] At its forty-seventh session, the Commission had also provisionally adopted, for inclusion in Part Three, article 1 (Negotiation), article 2 (Good offices and mediation), article 3 (Conciliation), article 4 (Task of the Conciliation Commission), article 5 (Arbitration), article 6 (Terms of reference of the Arbitral Tribunal), article 7 (Validity of an arbitral award) and Annex, article 1 (The Conciliation Commission) and article 2 (The Arbitral Tribunal).

212. At the forty-eighth session of the Commission, Mr. Arangio-Ruiz announced his resignation as Special Rapporteur. The Commission completed the first reading of the draft articles of Parts Two and Three on State responsibility and decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles provisionally adopted by the Commission on first reading,[138] through the Secretary-General, to Governments for comments and observations,

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its forty-fifth session (1993), the Commission referred to the Drafting Committee draft articles 1 to 6 of Part Three and the annex thereto. At its forty-seventh session (1995), the Commission referred to the Drafting Committee articles 15 to 20 of Part One dealing with the legal consequences of internationally wrongful acts characterized as crimes under article 19 of Part One of the draft articles and new draft article 7 to be included in Part Three of the draft.

[134] For the text of articles 1 to 5 (para. 1), with commentaries, see Yearbook ... 1985, vol. II (Part Two), pp. 24 et seq.

[135] For the text of article 5, para. 2, and articles 6, 6 bis, 7, 8, 10 and 10 bis, with commentaries, see Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10), pp. 132 et seq.

[136] For the text of articles 11, 13 and 14, see ibid., Forty-ninth Session, Supplement No. 10 (A/49/10), footnote 362. Article 11 was adopted by the Commission on the understanding that it might have to be reviewed in the light of the text that would eventually be adopted for article 12 (see ibid., para. 352).

[137] See ibid., para. 352.

[138] Report of the Commission on the work of its forty-eighth session Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), pp. 125-151. For the text of article 42, para. 3, and articles 47, 48 and 51 to 53, with commentaries, see ibid., pp. 152 et seq.

with the request that such comments and observations be submitted to the Secretary-General by 1 January 1998.

213. At its forty-ninth session, the Commission established a Working Group on State Responsibility to address matters dealing with the second reading of the topic.[139] The Commission also appointed Mr. James Crawford as Special Rapporteur.

214. At its fifty-second session, the General Assembly recommended that, taking into account the comments and observations of Governments, whether in writing or expressed orally in debates in the Assembly, the International Law Commission should continue its work on the topics in its current programme, including State responsibility, and recalled the importance for the Commission of having the views of Governments on the draft articles on State responsibility adopted on first reading by the Commission at its forty-eighth session, in 1996.

B. Consideration of the topic at the present session

215. At the present session the Commission had before it the comments and observations received from Governments on the draft articles provisionally adopted on first reading.[140] It also had before it the first report of the Special Rapporteur, Mr. James Crawford.[141] The report dealt with general issues relating to the draft, the distinction between "crimes" and "delictual responsibility", and articles 1 to 15 of Part One of the draft. The Commission considered the report at its 2532nd to 2540th, 2546th to 2547th and 2553rd to 2558th meetings, held from 19 to 29 May, 11 June, and 31 July to 7 August 1998.

216. The Commission established a Working Group[142] to assist the Special Rapporteur in the consideration of various issues during the second reading of the draft articles.

217. At its 2547th meeting, on 11 June, the Commission decided to refer draft articles 1 to 4 to the Drafting Committee. At its 2555th meeting, on 4 August, the Commission also decided to refer draft articles 5 to 8 and 10 to the

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[139] For the guidelines on the consideration of this topic on second reading adopted by the Commission on the recommendation of the Working Group, see Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 161.

[140] A/CN.4/488 and Add.1-3.

[141] A/CN.4/490 and Add.1, Add.2, Add.2/Rev.1 (French only) and Add.2/Corr.1 (Arabic, Chinese, English, Russian and Spanish only) and Add.3, Add.4, Add.4/Corr.1, Add.5 and Add.6.

[142] For the composition of the Working Group see para. 8 above.

Drafting Committee. At its 2558th meeting, on 7 August, the Commission further decided to refer draft articles 9 and 11 to 15 bis to the Drafting Committee.

218. At its 2562nd meeting, on 13 August, the Commission took note of the report of the Drafting Committee on articles 1, 3, 4, 5, 7, 8, 8 bis, 9, 10, 15, 15 bis and A. The Commission also took note of the deletion of articles 2, 6 and 11 to 14.

1. Introduction by the Special Rapporteur concerning some general issues relating to the draft articles

219. The Special Rapporteur paid tribute to previous Special Rapporteurs for their work on a difficult topic and expressed gratitude to the Commission for entrusting the second reading of the draft to him.

(a) Distinction between "primary" and "secondary" rules of State responsibility

220. The first part of his report contained a brief outline of the history of the Commission's work on State responsibility and discussed certain general issues. One of those issues concerned the distinction between primary and secondary rules of State responsibility. That distinction, which had formed the basis of the Commission's work on the topic since 1963, was essential to the completion of its task. The purpose of the secondary rules was to lay down the framework within which the primary rules would have effect so far as concerned situations of breach. It was a coherent distinction even though sometimes difficult to draw in the particular and even though some of the draft articles, such as article 27, might stray slightly beyond it. He suggested that the Commission's aim should continue to be that set out in 1963, namely, to lay down the general framework within which the primary substantive rules of international law would operate in the context of responsibility; it would be more useful to keep in mind this distinction when considering particular articles so as to avoid a lengthy general debate; there might be good reasons for including an article, notwithstanding the fact that it appeared to lay down, at least in part, a primary rule; and it would be possible to assess whether the Commission had been able to develop a coherent distinction only when it had considered the draft articles as a whole.

(b) Scope of the draft articles

221. A second general issue was whether the draft articles were at present sufficiently broad in scope. Noting the comments received from Governments, the Special Rapporteur suggested three matters that might require further elaboration: (a) reparation, particularly the payment of interest; (b) erga omnes obligations, which were currently dealt with in article 40, paragraph 3; and (c) responsibility arising from the joint action of States.

(c) Inclusion of detailed provisions on countermeasures and dispute settlement

222. On the other hand, the Special Rapporteur noted that some Governments had expressed concerns regarding the inclusion of detailed provisions on countermeasures in Part Two and on dispute settlement in Part Three, and that the Commission would consider those issues at a later stage in accordance with its timetable for the consideration of the topic.

(d) Relationship between the draft articles and other rules of international law

223. A third general issue concerned the relationship between the draft articles and other rules of international law. The Special Rapporteur noted that some Governments believed that the draft articles did not fully reflect their residual character and had therefore suggested that article 37 (*lex specialis*) be made into a general principle. That proposal seemed valid, but could not apply to principles of *jus cogens*. He suggested that the Commission discuss the draft articles on the assumption that, where other rules of international law, such as specific treaty regimes, provided their own framework for responsibility, that framework would ordinarily prevail.

(e) Eventual form of the draft articles

224. The last general issue concerned the eventual form of the draft articles. The Commission did not generally decide on its recommendation concerning this issue until it had completed consideration of the matter, although in certain contexts, such as reservations and succession in respect to nationality, the decision had been made earlier. The draft articles on State responsibility had been drafted as a neutral set of articles that were not necessarily designed as a convention or a declaration. While the dispute settlement issues relating to countermeasures in Part Two could be considered independently of the question of the form of the draft articles, he recognized that the Commission would need to take a position on the question when considering the dispute settlement provisions in Part Three which could be included in a convention but not a declaration. The Special Rapporteur further recognized that, even if the Commission opted for a convention, the question of dispute settlement provisions could be left to a subsequent diplomatic conference. The preference of some Governments for a non-conventional form for the draft articles was clearly influenced by their concerns regarding the substance of the existing draft articles. The Commission could objectively approach the question of the form of the draft articles only after it had reviewed the substance of the draft articles in the light of subsequent developments, taken decisions on key questions and endeavoured to prepare a generally acceptable text. While noting the dual approach suggested by one Government entailing the adoption of a

declaration of principles followed by a more detailed draft convention, which had been used in other fields of international law, the Special Rapporteur feared that this approach would not be acceptable to the Governments that were opposed to a convention. He recommended deferring consideration of the question at the current session, since it would be time-consuming and would detract from the debate on the substance of the draft articles.

2. Summary of the debate on general issues

225. The Commission held a brief debate on the general issues identified by the Special Rapporteur for two reasons: (a) the Commission should concentrate at the current session on the question of State crimes and the articles contained in Part One; and (b) for the most part, those issues could not be resolved at the current stage of work on the topic.

(a) Distinction between "primary" and "secondary" rules of State responsibility

226. The view was expressed that the distinction drawn between primary and secondary rules, despite all its imperfections, had considerably facilitated the Commission's task by freeing it from the burdensome legacy of doctrinal debate on such questions as the existence of damage or the moral element as a condition of responsibility. By deciding to leave aside the specific content of the "primary" rule violated by a wrongful act, the Commission had not intended to disregard the distinction between the various categories of primary rules nor the various consequences which their breach could entail.

(b) Scope of the draft articles

227. In terms of the scope of the draft articles, the view was expressed that it was necessary to achieve a balance between the first two parts of the draft by pruning the unduly detailed Part One, especially the "negative" articles on attribution and some aspects of chapter III dealing with the distinctions between different primary rules, while filling the gaps in Part One concerning important issues, such as the joint action of States (solidary liability), and giving more weight to rather superficial aspects of Part Two, which ignored essential, technical questions, such as calculating interest, and was too general to answer the needs of States. It was suggested that, in considering Part One of the draft, a careful distinction should be drawn between those provisions which were and those which were not hallowed by State practice in order to avoid eliminating provisions on which some international judgement or arbitral award was already based. On the other hand, it was suggested that the Commission should debate the general scope of the draft articles, including the question of dispute settlement and the crucial question of crimes and, taking account of the views of those Governments that had forwarded their comments on the topic, submit various options and seek the reactions of Governments.

228. As regards the title of the draft articles, it was observed that "State responsibility under international law" would be more juridically precise and would emphasize the international law element of this responsibility.

(c) Inclusion of detailed provisions on countermeasures and dispute settlement

229. There was general agreement concerning the importance of considering these issues in detail at a later stage of work on the topic.

(d) Relationship between the draft articles and other rules of international law

230. Having regard to the International Court of Justice ruling in the Gabćikovo Nagymaros[143] case, it was considered important to indicate clearly the relationship between the draft articles to be produced by the Commission and the provisions of the Vienna Convention on the Law of Treaties. The view was also expressed that the idea of extending to Part One of the draft articles the *lex specialis* provision in article 37 of Part Two was not as simple as it looked because the special regime would prevail only if it provided for a different rule.

(e) Eventual form of the draft articles

231. With respect to the eventual form of the draft, some members endorsed the Special Rapporteur's suggestion to begin the consideration of Part One at the current session and defer deciding on the recommended form of the draft until the next session. The view was expressed that the Commission should refrain from entering into a debate on the form of the draft articles, since such a procedural debate might obscure substantive differences, the Commission could ill afford to lose valuable time that it needed to address the extensive topic of State responsibility and it would in any case be impossible to settle that question in advance. Noting the consideration of similar issues in relation to the Vienna Convention on the Law of Treaties, it was considered premature for the Commission to decide on the final form of the draft articles at the current session, particularly in view of the limited and inconclusive guidance given by Governments.

232. However, other members were not entirely persuaded by these arguments. While recognizing that the Commission usually recommended the form its draft should take after concluding its consideration thereof, the view was expressed that the Commission should have reached that stage by now; there was no reason to believe that the Commission would be in a better position to consider the question in the next year or two; and the link between the form of the draft

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[143] Case Concerning the Gabćikovo Nagymaros Project (Hungary/Slovakia), I.C.J. Reports, 1997, p. 3.

articles and the issues excluded from or insufficiently developed in the draft articles was a fundamental reason that militated in favour of the Commission's taking an immediate interest in the matter, rather than the dispute settlement provisions. It was suggested that a decision concerning the final form of the draft should not be postponed, since the form would govern both the structure and the content of the instrument and that, given the scepticism expressed by Governments about the likelihood of a convention on the topic being adopted in the near future, it might be expedient to adopt a compromise solution in the form of a code of State responsibility under international law that would be similar to a convention in its content, but would resemble a General Assembly declaration, in the extent to which it was binding.

233. The view was expressed that the elaboration of a treaty was not essential, since the positive effect of an instrument stemmed from its content rather than its form. In addition, the treaty form had disadvantages concerning the varying application of the law, depending on whether a State was a party thereto, the rigidity of treaty language and the possibility of States entering reservations. Although the preparation of a convention had seemed the most logical course of action when the Commission had begun its work on the topic, subsequent experience indicated that other options might be equally viable, given the delay in ratifying conventions which permitted certain interpretations a contrario to be drawn, and that consideration should therefore be given to elaborating a non-binding yet authoritative document to be adopted by the General Assembly.

234. There was some support for considering the successive elaboration of two instruments, possibly in the form of a declaration and then a convention, with attention being drawn to a similar undertaking in the field of outer space law. It was suggested that these instruments could take the form of a general declaration setting forth the essential principles of the law of State responsibility and a more detailed guide to State practice to meet the needs of States. It was also suggested, on the one hand, that the first document could set forth guiding principles in the area of State responsibility embracing the content of Part One of the draft articles and incorporating some ideas from Part Two that were already accepted in State practice, and that the second treaty or non-treaty instrument could be more elaborate, possibly containing elements of progressive development, and would seek to tackle all aspects of State responsibility.

235. On the other hand, a concern was expressed that this two-track approach would not ensure the adoption of the second binding instrument unless there was a clear linkage between the two instruments, and that it would cause still further delays.

3. Concluding remarks of the Special Rapporteur on the debate on general issues

236. Following the consideration of the first part of his report, the Special Rapporteur observed that there was no general definitions clause in the draft articles, though implicit definitions, including that of State responsibility itself, were craftily concealed in many places. Terminological questions were addressed in chapter II of his report. Although the word "responsibility" was by now too deeply entrenched in the draft and in the doctrine to be changed, he agreed that it needed explanation, possibly in the commentary.

237. He had also been giving careful thought to the way in which the very rich material contained in the commentaries could be best displayed. One possible solution would be to prepare a two-tier commentary, consisting of a first, more general and explanatory part, and a second, more detailed part. The contrast between Parts One and Two that had correctly been pointed out was equally apparent in the commentaries.

238. The Commission should request the views of Governments on all questions throughout the exercise and take careful account of these views. In terms of the eventual form of the draft, the Commission could well decide that it should take the form of a declaration rather than of a convention, taking account of the limited and varied views so far received. However, while taking account of Governments' views, the Commission must at the same time reach its own conclusions, if possible by consensus, as to what course should be taken. That conclusion should be submitted as a provisional view to the Sixth Committee, and the Commission should listen very carefully to the reactions thereto.

239. While he was not opposed to the suggested approach of elaborating two successive instruments, possibly in the form of a declaration and a convention, the Special Rapporteur felt that this approach required further clarification. The approach would appear to require some differentiation between more and less essential draft articles; there was no need to make that differentiation at the current session. The Commission could ask the Sixth Committee about this option and would, of course, attend to any consensus that emerged, either from its own discussions or from those of the Sixth Committee. But the Commission did not need to reach that decision at the current session. Moreover, given the form of the draft articles and the detailed work done on them, it would be easier at the current stage to produce the detailed text first and to derive from it, if required, a more general statement of a few basic principles, than it would be to go back to basics and discuss principles at large. The latter course risked still further delays and might appear to involve setting to one side the work that had been done.

240. The Special Rapporteur hoped that, during the current session, the Commission would be able to consider the general principles in Part One (articles 1-4), together with the detailed provisions concerning attribution (articles 5-15), which also raised important questions of principle. The substance of the topic needed to be fleshed out at present, on the understanding that, for the next session, he would propose a procedure for addressing the form it would take.

4. Introduction by the Special Rapporteur concerning the distinction between "criminal" and "delictual" responsibility

(a) Treatment of State crimes in the draft articles

241. Article 19, paragraph 1, indicated the irrelevance of the subject matter of the obligation in determining the existence of a breach or a wrongful act. This unquestionable proposition was already clear from article 1. Article 19, paragraph 4 defined residually an international delict as anything that was not a crime. Its fate therefore depended on paragraphs 2 and 3.

242. Article 19, paragraph 2, defined an international crime as an internationally wrongful act which resulted from the breach by a State of an international obligation so essential for the protection of the fundamental interests of the international community that its breach was recognized as a crime by that community as a whole. Article 53 of the Vienna Convention on the Law of Treaties was a precedent for such a circular definition. Mere circularity was not fatal to article 19. Nonetheless, paragraph 2 was problematic, as indicated by the Commission's attempt to provide clarification in paragraph 3.

243. Article 19, paragraph 3, was defective for the following reasons: it failed to define crimes; its obscurity made it impossible to know what, if anything, was a crime; it was merely indicative ("may result"); it was not exclusive ("*inter alia*"); it subjected the notion of crimes to numerous qualifications by providing that paragraph 3 applied subject to paragraph 2 and on the basis of the rules of international law in force (the only possible basis for its application anyway); it provided a series of examples which, because of those qualifications, were not examples at all; and it contradicted paragraph 2 by introducing a new criterion of the seriousness of the breach. In essence, it was nothing more than a system for *ex post* labelling of certain breaches as "serious".

244. The Commission had attempted to qualify its decision to include article 19 by indicating in a footnote to article 40 that the term "crime" was used for consistency with article 19, and that alternative phrases, such as "an international wrongful act of a serious nature", could be used to avoid the

penal implication of the term "crime". In this view, the term "crime" was apparently used in the draft articles not in the ordinary sense, but in some special sense. Delict was defined as everything that was not a crime, and crime was defined as something special that was not a delict - which, even if true, was unhelpful.

245. Legal systems usually defined crimes by labelling, through defined procedures, the conduct and the perpetrator as criminal and by attaching special consequences described as criminal to them. The draft articles failed entirely to provide defined procedures and to attach distinctive consequences to crimes.

(b) Comments of Governments on State crimes

246. The comments of Governments on State crimes indicated varying degrees of satisfaction or dissatisfaction with the draft: a number of Governments were vehemently opposed to the notion of crimes and regarded it as capable of destroying the draft articles as a whole; other Governments believed that there was a qualitative distinction in international law between certain breaches that could be reflected in a number of ways without necessarily using the term "crime"; still other Governments, while supporting the distinction, argued that the current draft articles were unsatisfactory because they failed to develop this distinction adequately in terms of the procedural implications or consequences of crimes.

(c) Existing international law on the criminal responsibility of States

247. While many provisions of the draft articles had become part of international law, having been referred to in judicial decisions of international courts and tribunals and in the literature, article 19 had not. There had been no case in practice of the application of article 19, in contrast to other draft articles. Article 19 had given rise to a very contentious debate among jurists and neither they nor States agreed as to what should be done with it. Thus, the Commission should have a full-scale debate on article 19, which had not been reconsidered since its inclusion in the draft articles in 1976 over 20 years ago.

248. In the period between the world wars, following the unsuccessful experiment of the war-guilt clause in the Treaty of Versailles (which was the nearest that the international community had come to the criminalization of a State), a number of scholars analysed in the commentary had attempted to develop the notion of international crimes of State as a meaningful term. Contrary to that limited doctrinal tradition, the Nürnberg Charter provided for the punishment of individuals and did not treat the Powers in that war as criminals. Furthermore, the Nürnberg Tribunal had expressly recognized that crimes against international law were committed by men, not by abstract entities, and that only by punishing

individuals who committed such crimes could the provisions of international law be enforced.

249. By 1976 there had been considerable discussion on crimes in some parts of the literature, but there had been no judicial authority or generally accepted practice in the post-war period in support of the distinction. Initially, developments after 1945 had been marked by a regression. For many years the Nürnberg precedent was not followed by other international criminal trials of individuals at the international level, but rather the diffusion of certain crimes which could be tried by State courts against individuals under systems which focused on judicial cooperation and the extension of national jurisdiction. It was true that the Convention on the Prevention and Punishment of the Crime of Genocide envisaged the international trial of individuals for the crime of genocide, but it did not envisage State crime or the criminal responsibility of States in its article IX concerning State responsibility. Neither attempts to define the crime of aggression, which had the greatest possibility of being described as the crime of a State at that time, nor relevant Security Council practice provided support for the notion of State crimes. The absence of significant practice in support of the notion of crime in 1976 was implicit in the commentary to article 19, which referred to three judicial decisions in favour of the proposition of crimes, namely, two decisions concerning countermeasures for acts that were not crimes in any view of things, and the dictum in the Barcelona Traction[144] case which concerned erga omnes obligations and not crimes. It was significant that the International Court had sought to incorporate obligations erga omnes within the framework of general international law, for example in the East Timor[145] and Bosnia[146] cases: it had not treated such obligations as creating a wholly distinct category dissociated from the rest of the law. In the view of the Special Rapporteur, this was the appropriate strategy. The notion of obligations erga omnes did not support a distinction between crimes and delicts, particularly since many breaches thereof were not crimes as defined by article 19.

250. Since 1976 there had been an enormous debate concerning article 19 in the academic literature, a secondary source which by itself did not make

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[144] Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, I.C.J. Reports 1970, p. 3.

[145] East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995, p. 90.

[146] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (Preliminary Objections), I.C.J. Reports 1996, p. 595.

international law, in particular where no consensus was thereby revealed. The primary sources, namely, treaties, decisions and State practice since 1976, likewise did not provide any support for the notion of State crimes. The decisions suggested that the doctrine of punitive damages, a minimum requirement for a system of crimes, was not part of general international law. The recent decision on the issue of a subpoena in the Appeals Chamber of the International Tribunal for the Former Yugoslavia (*Prosecutor v. Blaskic*)[147] held that, under current international law, States could not be the subject of criminal sanctions akin to those provided for in national criminal justice systems. While the Security Council had established procedures for trying and punishing individuals for crimes under international law, it had never used the term "international crime" in relation to a State in the sense of article 19; it had continued to be very reticent to use the term "aggression" even in relation to clear cases of the unlawful use of force; and it had been very uneven in its condemnation of the conduct of States that might be considered criminal.

(d) Relationships between the international criminal responsibility of States and certain cognate concepts

251. The Special Rapporteur believed that the provisions on State crimes as actually formulated detracted from the more important task of defining more systematically the consequences of different categories of obligation in the hierarchy of substantive norms in international law that were generally recognized, including obligations *erga omnes* and norms of *jus cogens*, norms which were non-derogable. The Commission should seek to ensure that the consequences of those categories of norms were carefully spelled out in the draft articles.

(e) Possible approaches to international crimes of States

252. The Special Rapporteur drew attention to five possible approaches for dealing with international crimes of States, as set forth in paragraph 76 of his first report, namely, (a) the approach embodied in the present draft articles; (b) replacement by the concept of "exceptionally serious wrongful acts"; (c) a full-scale regime of State criminal responsibility to be elaborated in the draft articles; (d) rejection of the concept of State criminal responsibility; and (e) exclusion of the notion from the draft articles, without prejudice to (i) the general scope of the draft articles and (ii) the possible further elaboration of the notion of "State crimes" in another text.

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[147] *Prosecutor v. Blaskic (Judgement on the request of the Republic of Croatia for Review of the decision of Trial Chamber II of 18 July 1997)*, Case No. IT-95-14-AR108 *bis*.

253. In considering these approaches, the Commission should bear in mind the constraints of the international community as well as of the Commission. The former effectively precluded the possibility of imposing a system of crimes which, in important respects, would qualify the existing provisions of the Charter of the United Nations. As to the latter, the Commission had as a priority the completion of the topic during the current quinquennium.

254. The Special Rapporteur drew attention to the importance of the question of whether, in using the word "crime", the Commission intended to convey the general connotation of a distinctive wrongful act which attracted the condemnation of the international community as a whole and which was distinct from other forms of wrongdoing in terms of the nature of the act, the special consequences to which it gave rise, and the special procedures to which it was subject. Notwithstanding many differences between the international and national systems, the analogy with national law should not be entirely rejected and the term "crime" should not be used in a completely abnormal sense. It should be stressed that whenever international texts used the term "crime" - as they often did, though rarely if ever in relation to States as such - they used the term with its normal penal connotation.

255. Turning to the options before the Commission, the first alternative was to maintain the status quo by retaining the provisions of the draft articles relating to crimes. However, those provisions did not establish any distinctive and appropriate system for crimes: Part One did not distinguish between "crimes" and "delicts" in addressing issues relating to the origin of international responsibility, such as imputation, complicity or fault (dolus or culpa); Part Two did contain some minor distinctions between the consequences of crimes and delicts in terms of not recognizing or assisting in maintaining the unlawful situation created by a crime, but these obligations were not properly limited to crimes; and Part Three did not provide any specific procedure for crimes, notwithstanding the existence of such procedures in other legal systems and the procedural due process requirements that were a distinctive feature of criminal liability. The present draft articles, by minimizing the consequences of crimes, tended to trivialize delicts as well.

256. The second alternative adumbrated in the footnote to article 40 as adopted on first reading was to replace the concept of international crime by the concept of exceptionally serious wrongful acts. There were two possible interpretations of this alternative, both of which were problematic. First, this alternative could be tantamount to reintroducing the notion of crimes under another name. The Commission should use the term "crime" if that was its intention. Second, it could cover a broader spectrum of serious wrongful acts,

without referring to a separate category of norms. But to indicate that only certain norms gave rise to serious breaches would trivialize the rest of international law.

257. The third alternative was to criminalize State responsibility by admitting that State crimes existed and treating them as real crimes which called for condemnation, special treatment, special procedures and special consequences. This would require significant changes in the present draft to provide a sufficient definition of crimes, a collective system for investigation, a procedure for determining the guilt of the State, a system of sanctions and, eventually, a system for purging the criminal State of its guilt.

258. The fourth alternative was entirely to exclude the possibility of State crimes because the existing international system was not ready for it, and to pursue the prosecution and punishment of crimes committed by individuals through the two ad hoc international tribunals and possibly the future international criminal court.

259. The fifth alternative was to separate the question of the criminal responsibility of States from the questions relating to the general law of obligations addressed in the draft articles, while recognizing the possible existence of crimes and the corresponding need to elaborate appropriate procedures for the international community to follow in responding thereto. This approach would be consistent with virtually all legal systems, which treated criminal responsibility separately, and would facilitate the elaboration of the special procedures required by international standards of due process.

5. Summary of the debate on the distinction between "criminal" and "delictual" responsibility

260. The Special Rapporteur was commended for a balanced and incisive report that contained a thorough analysis of the issues and options relating to State crimes and had provoked an enlightening and fruitful debate.

(a) Comments of Governments on State crimes

261. There was general agreement concerning the importance of taking into account the views of Governments in considering the draft articles on second reading. In this regard, some members emphasized the need to take into account the negative views of various Governments concerning the notion of State crimes, which could affect the successful outcome of work on the topic. However, other members were reluctant to draw any conclusions from the diverse views submitted by a limited number of States, which were not necessarily representative of the views of the international community.

(b) Existing international law on the criminal responsibility of States

262. There were different views concerning the extent to which existing international law provided a foundation for the notion of State crime.

(i) The jurisprudence of the International Court of Justice

263. The jurisprudence of the International Court of Justice was cited as evidence that State crimes formed part of the corpus of international law and that the concept was gaining acceptance. In this regard, some members referred to the pleadings and the preliminary decision in the Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia)[148] as indicating that: the recognition of genocide as a crime under international law in article I of the Convention did not mean that only crimes committed by State agents were involved; the contemplation of the commission of an act of genocide by "rulers" or "public officials" in article IV did not exclude the responsibility of a State for acts of its organs; and article IX did not exclude any form of State responsibility, including criminal responsibility.

264. In contrast, other members expressed the view that the case contained no indication, either in the statements of the Court or the pleadings of the parties, that would suggest that the Genocide Convention referred to the criminal responsibility of States in the penal sense. Furthermore, the travaux préparatoires made it clear that article IX of the Convention did not refer to the criminal responsibility of States. Rather, the role of the State responsibility regime with respect to the crime of genocide was more or less analogous to that of the general responsibility regime, and in particular to establish the responsibility of States to redress the injuries suffered by victims.

265. There were also references to Barcelona Traction[149] and the other relevant jurisprudence of the Court concerning the recognition of erga omnes obligations, as part of an evolutionary process which laid the foundation for the notion of State crimes. Article 19 was described as reflecting a major stage in the evolution of international law from an early undeveloped legal system to an advanced legal system, from a bilateralism which had sought to provide reparation for the injured party only to a system of multilateralism in which a community response to the violation of community values was possible, from individual criminal responsibility to State responsibility for crimes under international law. The purpose of this evolutionary process had been to develop

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[148] See note 146 above.

[149] See note 144 above.

and consolidate, on the basis of the institution of international responsibility, the notion of international public order in the interests of the entire community of States.

266. In contrast, the jurisprudence of the Court in the Barcelona Traction[150] case was described as concerning the scope of erga omnes obligations and not the criminal responsibility of States. The recognition implicit in the acceptance of jus cogens/erga omnes obligations was a recognition that international obligations could be owed to the international community as a whole, and not only on a bilateral basis. While the recognition of community interest could be regarded as a necessary precondition for any notion of crimes or jus cogens or erga omnes violations, it could not be said to require the invention of a notion of State crimes.

(ii) Treaty law

267. A comment was made that, on the basis of the Charter of the United Nations and of international practice, treaty law had placed among exceptionally serious wrongful acts aggression, genocide, war crimes, crimes against the peace, crimes against humanity, apartheid and racial discrimination. As international law, and particularly the international jurisprudence, evolved, acknowledgement of such violations by States as falling into a particular category of wrongful acts was gradually taking shape.

(iii) International organizations

268. The view was expressed that the fundamental interests of the international community that were threatened by an exceptionally serious wrongful act or so-called "crime" were often referred to in various international bodies.

(iv) Definition of aggression

269. In response to suggestions that State crimes were non-existent or indefinable, attention was drawn to the definition of aggression adopted by the General Assembly in its resolution 3314 (XXIX) of 14 December 1974. However, other members did not share the view that that resolution constituted recognition of the criminal responsibility of States or a definition of the State crime of aggression in a penal law sense. According to those members, it was notoriously defective as a definition in any event.

(v) Security Council sanctions

270. There were different views as to whether the sanctions imposed by the Security Council with increasing frequency in recent years constituted a criminal penalty or measures taken to restore international peace and security. Some members were of the view that Chapter VII of the Charter of the United

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[150] See note 144 above.

Nations had definitively fractured the classical bilateral relationship in the law of responsibility and its traditional unity by authorizing the Security Council, on behalf of the international community as a whole, to apply preventive and repressive measures of a collective nature, including armed force, against a State that had threatened or violated the peace or committed an act of aggression. The authority of the Security Council to take measures it deemed necessary against Member States under the Charter of the United Nations was based squarely on relations of responsibility, since the Security Council was empowered to take action only in the event of the violation by a State of particularly important norms of international law. In the event of a serious breach by a State of international obligations, which posed a threat to international peace and security, the Security Council was authorized to take preventive measures or to use force. The Security Council's authorization of the bombardment of Iraq was cited as an example of a criminal penalty rather than a civil sanction.

271. In contrast, other members were of the view that international responsibility for particularly serious illicit acts, its content and its consequences, must be distinguished from the powers conferred by the Charter on the Security Council to restore or maintain international peace and security. The Security Council did not act in terms of State responsibility and did not impose sanctions or penalties. When confronted with a situation that posed a threat to international peace and security, it was enabled to take appropriate military or non-military measures to redress the situation. Those measures might be contrary to the interests of a State which had not committed a wrongful act or might affect a State that had committed an act viewed as contrary to international law. United Nations sanctions under Chapter VII of the Charter as well as war reparations and so-called "punitive damages" were sui generis and had nothing to do with criminal responsibility.

(vi) The literature

272. There were different views concerning the conclusions to be drawn from the divergent opinions of scholars reflected in the literature on the subject.

(vii) Conclusions regarding State practice

273. Some members concluded that the concept of State crimes was not established in the international law of State responsibility. There was no basis in law for a qualitative distinction among breaches of international obligations. There was no basis in State practice thus far for the concept of international State crimes, in contrast to the principle of individual criminal responsibility which had been established by the Nürnberg, Tokyo, former Yugoslavia and Rwanda tribunals, codified in numerous international instruments and would be put into

practice in the future international criminal court. There was no State practice to support the notion of crimes by States in contrast to the positive developments concerning individual responsibility since the Second World War. The distinction established in article 19 had not been followed up in international jurisprudence. No State, as a legal person, in contrast to its leaders, had ever appeared as a defendant in criminal proceedings.

274. Other members considered that the existence of rules in international law essential to the protection of the fundamental interests of the international community as a whole and the fact that those rules were quite often breached were today generally admitted. Crimes, with their connotation of violence and condemnation by world opinion, were committed at the international level and could not be realistically, appropriately or accurately regarded as grave delicts. The lack of a legal judgement did not imply the non-existence of crimes but rather the absence of bodies with jurisdiction to deal with them. The notions of crime and jus cogens existed but were virtually never used in practice, primarily because few rules had these characteristics and serious violations were rare. But rarity did not warrant neglect of such cases, since the future of international law lay in those concepts as well as the promise of a society based on the reinforcement of solidarity. Even assuming that the weight of evidence currently tended to favour the view that international law did not recognize State criminality, that did not mean that it was not necessary or appropriate for the Commission to try to do anything about it.

(c) Relationships between the international criminal responsibility of States and certain cognate concepts

(i) Individual criminal responsibility under international law

275. There were different views as to whether a State could commit and be held responsible for a crime under international law in contrast to an individual. Some members believed that a State, as a legal person or a mere abstraction, could not be the direct perpetrator of a crime. A State acted through its organs, consisting of natural persons. The individuals who planned and executed the heinous acts of States, including the leaders of the States, must be held criminally responsible. They referred to the Nürnberg Tribunal judgement indicating that crimes against international law were committed by individuals, not abstract entities. The principle of individual criminal responsibility applied even to heads of State or Government, which made it possible to deal with the people at the very highest level who planned and executed crimes, and obviated any need for the notion of State crimes, which would be further reduced by the establishment of the international criminal court. It would be more worthwhile to develop the concept of the international criminal responsibility

of individuals, an area in which there had been significant developments. The international criminal responsibility of individuals did not provide any foundation for "crimes of States". It was unwise, and created misunderstandings, to draw an analogy between responsibility for State crimes with responsibility for crimes committed by individuals.

276. Other members believed that certain international crimes could be committed both by individuals and by States and that the traditional view, based on the Nürnberg approach, was too narrow. The conduct of an individual could give rise to the criminal responsibility of the State which he or she represented; in such cases, the State itself must bear responsibility in one form or another, such as punitive damages or measures affecting the dignity of the State. The crimes listed in article 19 were the result of State policy rather than individual conduct and it would be illogical to punish such acts solely at the individual level. Naturally, the penal sanction could not be the same for an individual and for a State. Given the further development of individual criminal responsibility since Nürnberg, it would be inconsistent to refuse to recognize the particularly solemn responsibility of States themselves for the same type of offences. Such an evolution was logical and desirable, since it went in the direction of safeguarding the supreme values of mankind, international peace and justice.

277. Some members believed that a clear distinction should be maintained between State responsibility and individual criminal responsibility. The view was expressed that when a crime was committed by a State, the government officials were held criminally responsible, but that did not mean that the responsibility of the State itself was criminal, as indicated by the _Blaskic_ case.

(ii) _Peremptory norms of international law (jus cogens)_

278. There were different views concerning the relationship between peremptory norms of international law (_jus cogens_) and the criminal responsibility of States. Some members believed that the two notions were closely linked, as indicated by the similarity between the definition of _jus cogens_ contained in article 53 of the Vienna Convention on the Law of Treaties and the definition of State crimes contained in article 19, paragraph 2, of the draft. However, this did not mean that a breach of _jus cogens_ necessarily entailed an international crime or that the consequences of a breach of _jus cogens_ were necessarily the same as the consequences of an international crime. The Commission had not devoted sufficient attention to these issues on first reading and should do so now. While agreeing that the Commission should consider whether _jus cogens_ norms were adequately addressed in the draft articles, other members did not agree that there was any link between these norms and the criminal

responsibility of States which, in their view, did not exist. It was suggested that the Commission should consider the notion of jus cogens in relation to exceptionally serious wrongful acts rather than State crimes.

(iii) Obligations erga omnes

279. There were different views as to whether obligations erga omnes should be further developed in the draft articles. Several members believed that there were significant differences concerning the legal consequences of the breach of an obligation erga omnes which were not adequately addressed in the draft. Suggestions for improving the draft included: providing a suitably graduated regime of responsibility to deal with erga omnes obligations; and setting out the legal consequences of their violation in the context of differentiated and balanced regimes. In considering these consequences, some members also emphasized the importance of bearing in mind that, although all jus cogens norms were by definition erga omnes, not all erga omnes norms were necessarily imperative or of fundamental importance to the international community.

280. Other members expressed concerns regarding giving primacy to or further developing the consequences of obligations erga omnes in the draft. These obligations were described as only one of three types of rules which formed increasingly smaller concentric circles, namely: erga omnes obligations, jus cogens norms, and international crimes. The erga omnes principle was also described as mainly concerning the interest and standing of States (locus standi) in a particular case which could give rise to certain problems in terms of the right of any State: (a) to bring an action to protect a public or collective interest of the community which could result in a proliferation of legal actions and increase State reluctance to accept the jurisdiction of the International Court of Justice; (b) to assert a legal interest in vindicating the community or collective interest outside the judicial arena, for instance, in international forums; (c) to take countermeasures, unilaterally or jointly, against what they perceived to be the offending State or States; (d) in the absence of judicial control, to become a self-appointed policeman of the international community; and (e) to assert a claim for compensation without having suffered any material damage.

281. Several members emphasized the need to examine carefully the relationship between obligations erga omnes, jus cogens norms and exceptionally serious wrongful acts or State crimes when considering the consequences of internationally wrongful acts. It was suggested that the current draft articles should be reviewed to determine whether they needed to be reorganized or reformulated, particularly with respect to attribution of the illicit act, circumstances precluding wrongfulness, identification of the injured State,

rights and obligations of other States, means of compensation, operation of self-help mechanisms, dispute settlement and the relationship between the general regime of responsibility and special regimes.

282. While recognizing the relationship between the notion of State crime and the notions of jus cogens and erga omnes, some members were of the view that the notion of State crimes should be dealt with in the draft articles because it was not synonymous with the other notions and should not be trivialized by being replaced by or relegated to a species of them.

(d) Possible approaches to international crimes of States

(i) Preliminary issues

a. Notion of "objective" responsibility

283. There was support for the concept of "objective" responsibility as a fundamental basis for the entire draft, one which rested on solid grounds. The view was expressed that the Commission had taken the truly revolutionary step of detaching State responsibility from the traditional bilateralist approach that had been conditioned upon damage, instead choosing an objective approach based on the transgression of a rule that brought State responsibility closer to the public order system found in modern national law. It was suggested that the Commission now had to take the remaining, second step to implement the conceptual revolution, where it was most necessary, in response to breaches of international law which constituted offences against the international community as a whole. The notion of objective responsibility was described as an acknowledgement in resounding terms that there was such a thing as international lawfulness, and that States must respect international law even if they did not, in failing to respect it, harm the specific interests of another State, and even if a breach did not inflict a direct injury on another subject of international law. In short, an international society founded on law existed. The "objective" character of responsibility was further described as being most apparent in relation to international crimes because it was in that context that the general and "objective" interests of the international community as a whole must be protected. It was felt that neither the insertion of damage as one of the constituent elements of a wrongful act nor the reference to some form of culpa or dolus, in other words a mens rea, could be expected to introduce greater clarity or stability into international relations, given the subjective nature of such notions.

b. Civil law or criminal law nature of State responsibility

284. Different views were expressed concerning the nature of the law of State responsibility and its implications for the question of State crimes. Some members considered the notion of State crimes as inconsistent with the civil law

nature of State responsibility. Other members believed that the law of State responsibility, which governed relations between sovereign equals, was neither criminal nor civil, but rather international and sui generis in nature. Still other members suggested that there could be future developments in the law of State responsibility in the direction of a separation of civil and criminal responsibility.

c. Domestic law analogy

285. There were different views concerning the implications of the domestic law analogy with respect to the question of State criminal responsibility. Some members believed that the analogy with domestic law could be useful in developing the notion of the criminal responsibility of States, with attention being drawn to the development of the notion of corporate criminal responsibility in some legal systems and to international standards in relation to criminal process. This did not mean that the Commission should proceed from a preconceived idea of crime based on domestic law or that every aspect of domestic law would be relevant in the international context. Other members believed that domestic criminal law did not provide any foundation whatever for "crimes of States" and that the idea of criminalizing the State should be abandoned to avoid confusion with domestic law notions that applied solely to individuals and could not be assimilated in international law.

d. Relevance of Chapter VII of the Charter of the United Nations and other special regimes

286. There were different views concerning the relationship between the draft articles and special regimes such as Chapter VII of the Charter of the United Nations. In response to concerns expressed regarding the risk of encroaching on the responsibility of the Security Council for matters within its competence, the view was expressed that the Security Council's role would not be undermined by the criminalization of State conduct since no one had proposed a change in its primary responsibility for the maintenance of international peace and security. Whereas the Security Council dealt with political aspects of such crimes, the regime of State responsibility should address their legal and juridical aspects. Furthermore, Security Council practice had been inconsistent in dealing with such situations and the permanent members of the Council had frequently, by exercising the right of veto, prevented the international community from taking effective measures against States involved in the commission of international crimes.

287. At the same time, the view was also expressed that it was important to realize that existing international law provided more comprehensive special regimes for dealing with the violations listed in article 19, such as

Chapter VII of the Charter of the United Nations concerning aggression, the United Nations human rights regime and the network of environmental treaties. The Commission should therefore adopt a cautious approach that would ensure the residual or supplementary nature of the future system of legal consequences to breaches of community obligations that were covered by specific regimes. The view was also expressed that the regime of State responsibility should not figure prominently in the endeavour of the international community to take action to suppress such abhorrent State crimes as aggression, genocide and war crimes; the United Nations Security Council was the political institution authorized to take action either under article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide or under Chapter VII of the Charter of the United Nations; defects in this system could only be remedied by the United Nations itself and not by a regime of State responsibility. The necessity or usefulness of the notion of crimes was diminished in view of the provisions in the Charter of the United Nations for the maintenance of international peace and security and the current vigorous action by the Security Council under Chapter VII of the Charter.

(ii) Approach embodied in the present draft articles

a. Definition of State crimes in article 19

288. The definition of State crimes contained in article 19 was, on the one hand, described as confusing, circular, lacking the necessary precision for criminal law, unhelpful for the indictment of any individual or State, and uncertain because it was dependent on subsequent recognition by the international community. On the other hand, it was remarked that all definitions were necessarily difficult, somewhat arbitrary and incomplete; the definition contained in article 19 was neither less precise nor less complete than that of "peremptory norm of international law" (jus cogens) contained in article 53 of the Vienna Convention on the Law of Treaties; and article 19 was arguably clearer and more explicit because it gave examples to clarify the concept. It was also noted that the legal technique used in article 19 of providing a general criterion for crimes followed by an enumeration of the most obvious crimes was imperfect, but not unknown. Attention was drawn to a different approach suggested by the Special Rapporteur (para. 48 of the first report) of defining crime by referring to its distinct procedural incidents or its consequences and defining delicts as breaches of obligations for which only compensation or restitution was available, and not fines or other sanctions.

289. As to article 19, paragraph 2, a concern was expressed that requiring recognition by the international community as a whole necessitated either a unanimous decision of States, which would be difficult if not impossible to

achieve, or the agreement of essential components of the international community, which were not clearly indicated. There was a suggestion to amend the provision as follows: "An internationally wrongful act which results from the breach by a State of an obligation that is essential for the protection of fundamental interests of the international community as a whole has specific legal effects."

290. The view was expressed that the idea of the existence of this category of wrongful acts should be maintained in paragraph 2, but that paragraph 3 should simply be deleted. The additional requirement of gravity ("a serious breach") in paragraph 3 was considered to be unjustified, given the inherently serious nature of the crimes listed in paragraph 2. In response to criticisms of article 19, paragraph 3, as merely a listing of vague concepts of crimes that was contradictory to paragraph 2, it was remarked that the draft Code of Crimes against the Peace and Security of Mankind provided a mere enumeration of these crimes rather than a specific definition.

291. As regards paragraph 3 (a), some members were of the view that aggression had been recognized as a State crime; aggression was an extremely serious breach of international law that could only be committed by States and not by natural persons; and the draft articles must therefore address the question of such extremely serious breaches of international law. In contrast, other members were of the view that aggression should not be used as the prime example of State crimes because it could not be defined in the draft articles in view of the role of the Security Council under the Charter; the draft Code did not define aggression because of the enormous difficulty of defining such a concept; the relevant General Assembly resolution was a political text and not a legal instrument; aggression was committed by persons acting on behalf of the State and using its resources; and a State had never been tried for aggression but the leaders of a State had been tried, for example, at Nürnberg.

292. With regard to paragraph 4, it was suggested that a clearer distinction should be made between international crimes and international delicts based on the degree of gravity of the breach, to avoid equating the breach of an international tariff clause with aggression or genocide. On the other hand, some members believed that it was inappropriate to use the terms "crime" and "delict" which were associated with the field of criminal law to denote an unrelated phenomenon. The domestic criminal law connotations of the terms "crime" and "delict" were considered inappropriate in the international sphere because the responsibility of the State was neither civil nor criminal, but international. Doubts were also expressed about the term "delict". The Special

Rapporteur noted that the word "delict" could not be used in the sense of article 19 without reintroducing the notion of crime.

b. Treatment of State crimes in Part One

293. The view was expressed that the provisions of Part One (other than article 19) had been drafted exclusively for the purpose of dealing with "delicts" and had become applicable to "crimes", as it were, faute de mieux. The Commission had never considered whether certain provisions of Part One, such as those relating to circumstances precluding wrongfulness, should not be reformulated. The question of the specific characteristics of the "secondary rules" connected with breaches of the "primary rules" essential for the protection of the fundamental interests of the international community as a whole needed to be raised in relation to the entire draft. In Part One, certain draft articles could not be readily applied to breaches of a multilateral obligation and still less readily to breaches of obligations erga omnes, a category of obligations which was wider than that referred to in paragraph 2 of article 19 in view of the "qualitative" distinction between erga omnes rules, depending on whether or not they had the nature of peremptory norms. Nevertheless, in view of the "technical" nature of the rules set forth in Part One, the question arose as to whether, within the category of erga omnes rules, a differentiation based on a "qualitative" distinction of their "content" was still necessary or in what cases it was necessary.

294. The view was also expressed that the Commission had elaborated Part One of the draft in the context of a general regime of responsibility to avoid the fragmentation of different regimes; the Commission had not adequately reflected the notion of State crimes by carefully laying the groundwork for two regimes; and the Commission should reconsider the provisions in Part One to achieve better alignment of the various parts of the draft, with reference being made to paragraph 83 and footnote 111 of the Special Rapporteur's first report.

295. The view was further expressed that articles 1 and 19 were based on the same foundations and should be read together, and that any changes to article 19 would automatically entail consequences for the preceding articles.

c. Notion of an injured State

296. There was general agreement that the Commission should give further consideration to the definition of an injured State contained in article 40, particularly in relation to erga omnes obligations, jus cogens and possibly State crimes or exceptionally serious wrongful acts. There was also general agreement that these notions were not coextensive and should receive separate consideration to avoid any confusion.

297. The view was expressed that article 40, paragraph 3, implemented the community interest in strong reactions to violations of community obligations by designating every State as "injured" and granting them the full range of responses to "crimes", including the right to take countermeasures, which rendered the danger of abuse particularly great. It would not be contrary to the community interest in strong responses to violations of community obligations to introduce a differentiated schema of responses available to different States based on their "proximity" to the breach, when States were the victims thereof. Article 40 could be redrafted to distinguish three different categories of States injured by breaches, as in article 60 of the Vienna Convention on the Law of Treaties, as an important step towards a solution.

d. Consequences of State crimes

298. Some members were of the view that the notion of State crimes could not be justified by the trivial, incorrect and confusing consequences set forth in the draft articles, which failed to provide for any criminal penalties, punitive damages, fines or other sanctions. It was considered insignificant to extend the applicability of restitution, and possibly jeopardize the political independence of the wrongdoing State, while rejecting the more serious notion of punitive damages. The duty to withhold assistance was considered derisory and the duty to cooperate was also ineffective in practice. It was considered incorrect to suggest that non-recognition and the duty not to aid and abet were specific to wrongful acts designated as crimes.

299. In contrast, the view was expressed that the Commission's inability to define the regime of so-called "crimes" could not be ascribed just to the complexity of the issues arising from breaches of obligations essential for the protection of the fundamental interests of the international community, and even less to the absence of such breaches in international life; it was due largely to the inconsistent approach adopted by the Commission which, after dealing with "ordinary" breaches - "delicts" - had failed to devote sufficient attention to "crimes" on first reading. Similarly, it was remarked that during the first reading the Commission had first addressed the consequences of crimes and delicts in an undifferentiated manner and later addressed the actual consequences of crimes, which had resulted in the elaboration of unsatisfactory provisions. It was suggested that in the second reading of the draft the Commission should consider on an article-by-article basis each candidate for status as a crime under article 19 with a view to determining whether and to what degree the regime of secondary rules to be devised by the Commission would be applicable to them.

300. Some members believed that during the second reading the Commission should draw a systematic distinction between the consequences of crimes and of delicts rather than discontinue consideration of the consequences of crimes. A qualitative distinction was necessary if only from the point of view of reparation, since pecuniary compensation was inappropriate in the case of serious crimes such as genocide. It was suggested that the draft articles should draw a balanced distinction between the two categories of responsibility, provide a separate regime for violations of a norm fundamental to the safeguarding of the international community as a whole which was not found in articles 51 to 53, and fill a number of other gaps, including in respect of who could raise the matter of a violation, what was the machinery for determining the existence of a serious violation and how and by whom the corresponding penalties would be established. It was also suggested that the Commission should try to develop separate consequences for crimes, taking into account the procedural aspects and guarantees of due process for criminal States, possibly in a separate chapter that might be optional in nature and provide the international community with the widest range of choice. It was further suggested that some of the consequences which should have been set aside for crimes had been included in simple delicts, for example, the provisions on countermeasures. In addition, the Commission had disregarded the fundamental consequences of the notion of crime, namely: (a) punitive damages, the existence of which in international law was indicated by article 45, paragraph 2; and (b) the denial of State immunity to individuals who committed serious acts as government officials on behalf of the State which permitted them to be brought before international criminal tribunals.

301. As regards article 53, it was suggested that the Commission should develop and supplement the fairly limited but not negligible consequences of international crimes envisaged in article 53 of the draft to make them more valid and convincing. Article 53 (a) was characterized as reflecting a fundamental difference in the consequence of crimes and delicts, namely, in the event of a crime, all States, including the direct victim, were under an obligation not to recognize as lawful the situation created by an unlawful act, unlike the victim of other violations. It was questioned whether anyone could oppose the obligation of not recognizing as lawful the situation created by an international crime or not rendering assistance to a State which had committed an international crime in maintaining the situation so created. While not opposing the non-recognition of consequences arising from so-called crimes of States, concerns were expressed regarding the a contrario implications, for example, with respect to the acquisition of territory by the lawful use of force

in self-defence. The duty not to recognize as lawful the situation created by a crime was also described as manifestly insufficient, for example, in cases of genocide. In addition, the duty of non-recognition and of cooperation in expunging the consequences of a crime were described as reflecting a growing spirit of solidarity among members of the international community and an attempt to act as a community according to a notion of international public order, which was a positive development in the obligation of solidarity among States. It was suggested that the concept of community based on solidarity was slowly gaining ground and must be taken into account in elaborating the legal provisions that would regulate relations among States.

(iii) Replacement by the concept of "exceptionally serious wrongful acts"

302. Some members supported the suggested approach of replacing the notion of State crimes by the concept of "exceptionally serious wrongful acts" which, in their view, would be more consistent with the international or *sui generis* nature of State responsibility and would avoid the confusion resulting from the domestic law analogy and penal law connotations which had complicated the consideration of the topic. Other members were of the view that the concept of "State crime" did not have an intrinsic penal connotation; a word had the meaning that was given to it in a particular legal system; terminology was not an important issue; and the term "State crime" could be replaced by another term as long as the basic idea reflected in article 19, paragraph 2, was retained. There was a suggestion to replace the term "crime" by "breach of a rule of fundamental importance for the international community as a whole" or even the violation of a rule of *jus cogens*. Still other members believed that the term "State crime" had acquired a certain meaning and a degree of acceptance; changing the terminology of the concept might trivialize it; the concept of State crime should be equated with the concept of crime in domestic law; and, insofar as possible, the serious consequences normally attached to crime in domestic law should attach to State crime.

303. A number of views and suggestions were expressed concerning how the Commission might proceed with this approach. The view was expressed that the elimination of the category of particularly serious illicit acts from the topic of responsibility would be an unacceptable step backwards in the process of building a more just and more equitable international order; the Commission should continue considering that special category of exceptionally serious wrongful acts and define as clearly as possible the criteria to be used for identifying such acts and the specific norms on responsibility that would be applied to them; and the basic idea underlying the particular seriousness of such wrongful acts indicated in article 19, paragraph 2, which took account of

the need to protect the higher interests of the international community as a whole, should be retained without criminalizing international responsibility.

304. The view was also expressed that the Commission could not ignore the need to equip rules of international law which consecrated fundamental interests of the international community with an adequate system of legal consequences of breach; the Commission should develop a system of differentiated responsibility which included an adequate regime of State responsibility for grave breaches of fundamental obligations in the community interest which incorporated two elements: an erga omnes obligation extending to all States and a jus cogens norm from which States were not permitted to contract out inter se; and article 19, paragraph 2, could provide a good starting point for developing a new concept to denote international obligations owed to the international community instead of crimes.

305. It was suggested that in reality there were degrees of responsibility depending on the primary rule breached that involved various levels of responsibility, rather than just crimes and delicts, and required a deeper analysis to determine the different consequences in terms of codification of the norms involved. A more satisfactory result would be achieved by determining the degrees of responsibility by reference to the kind of rules breached, instead of by dealing with the question of crimes which had hindered rather than promoted progress in an area that required legal precision. It was considered important to distinguish among the various degrees of wrongful acts that a State could commit in violation of various international obligations and, above all, to determine the legal consequences arising from the various categories of wrongful acts. It was also considered necessary to contemplate degrees of obligations running from those applying to a relationship among subjects of law and those that touched on the fundamental interests of the international community, since they had differing legal consequences. While in the context of relations between subjects of law it was for the injured State to take action and the damage and causal relationship were constituent elements of the regime of responsibility, as were the compensation or indemnification required, in the case of the violation of an essential norm or one of superior degree, it was for the community to take action, direct harm was not indispensable and the penalty was the consequence of the violation. It was also suggested that it would be more useful to perceive a continuum of the seriousness of a breach from the minor breach of a bilateral obligation to the material breach of an obligation owed to all States of a much more serious nature. The Special Rapporteur indicated that it would not be helpful if the work on the topic was constrained by a rigid dichotomy between crimes and delicts, particularly since the very

same act could constitute either a delict or a crime in relation to different persons or entities.

(iv) Full-scale regime of State criminal responsibility to be elaborated in the draft articles

306. Some members favoured developing the notion of State crimes in the draft; did not see any problem in doing so because the first reading had been predicated on the existence of State crimes; believed that the Commission could define the content of the notion of State crimes and elaborate the relevant regime within its present mandate which was not limited to certain aspects of State responsibility; but did not consider it necessary to elaborate all of the five elements envisaged by the Special Rapporteur in this approach. The assertion of the necessity of the five elements of a regime of State criminal responsibility was based on a preconceived idea of the notion of "crime" which incorrectly assumed that this regime in international law must be identical in all respects with internal law, failed to take account of the differences between international society and national societies and failed to recognize that words had the meaning given them by the legal system to which they belonged. The view was expressed that the Commission had no intention of criminalizing the conduct of States in the same sense as national law and that the draft articles on State responsibility did not, strictly speaking, contain any criminal element. It was described as utopian to envisage a system of State responsibility which included these elements.

307. Other members did not support this approach for the reasons given in their support of the approaches discussed in paragraphs 302 to 305 or 312 to 318.

a. Precise definition of State crimes (nullum crimen sine lege)

308. The view was expressed that it would be a difficult task to elaborate a precise definition of State crimes. It was suggested that it would be sufficient to provide a general definition of the notion of State crimes rather than defining the elements of the crimes, which was not necessary.

b. Adequate procedure and appropriate institution for investigation and determination of State crimes

309. Some members believed that the Commission should consider an appropriate procedure and institution for the objective determination of a State crime. It was considered necessary to provide a special procedure or set of rules which would satisfy the international community's legitimate desire to have some protection mechanism since, at the international level, there was still no legislative, judicial or police authority which attributed criminal responsibility to States or ensured compliance with any criminal law. It was also considered necessary to provide an appropriate institutional mechanism for

establishing objectively when a crime or delict had been committed, a question which should not be left to the subjective determination of the injured State, to avoid the risk of the notion of State crime being abuse by the powerful to oppress the weak.

310. Other members considered it unrealistic to envisage such a procedure or institution at the current stage of development of the international community, which provided no central authority to determine and impute criminal responsibility, no procedure for determining with authority whether a crime of State had been committed, no commonly accepted mechanism to decide on the existence of a crime and the requisite legal response, no mechanism endowed with criminal jurisdiction over States authorized to mete out punishment, and no institution fit to enforce criminal justice for State crime. The view was expressed that criminal justice presupposed the existence of a judicial system to decide whether an offence had occurred and to determine guilt but it would be extremely difficult to transplant the penal concept of crime into the realm of international law in view of the absence of the above procedures and institutions, which reflected the maxim *par in parem non habet imperium*. It was noted that the previous Special Rapporteur had attempted to provide a competent independent authority to whom the task of classifying the act as a crime might be entrusted but that the proposed complex regime for handling accusations of State crime had been rejected by the Commission as unworkable, contrary to the Charter of the United Nations, and beyond the Commission's mandate.

311. It was suggested that, since the community of States was still based largely on a decentralized system characterized by reciprocity and founded on the sole competence of States to ensure respect for law in accordance with their individual interests, States should have a duty to take the necessary steps to bring the responsible State to justice in an international community where the rule of law prevailed.

c. Adequate procedural guarantees (due process)

312. The remark was made that if the notion of State crimes was retained, it would be necessary to incorporate in a draft dealing with the general law of obligations a number of procedural provisions dealing, for example, with a possible prosecuting agency, complaints system, rules of defence and evidence, arrest, bail and release as well as an international judicial authority with compulsory powers to determine guilt and matters pertaining to sentence, which would lead to a chaotic result. It was also remarked that, although it was necessary to take account of procedural aspects of the notion of State crimes, it would not be possible to guarantee due process of law.

d. Appropriate sanctions

313. The view was expressed that civil responsibility, such as compensation, was inadequate to redress the injury suffered as a result of certain serious breaches such as genocide, and that punitive damages were part of any system of reparative justice. It was suggested that the Commission needed to give careful consideration to State practice, including the Security Council measures taken against such States as apartheid South Africa, Iraq and the Libyan Arab Jamahiriya before dismissing the possibility that a State could be regarded as criminal with respect to the question of punishment.

314. The view was also expressed that sanctions imposed by the Security Council as a political institution to maintain international peace and security could not be compared to criminal penalties imposed by a judicial body. The State, by definition, could not be the subject of criminal sanctions such as those provided for in national criminal justice systems, as indicated by the recent decisions of the International Tribunal for the Former Yugoslavia and the Inter-American Court of Human Rights. The view was expressed that compensatory damages and exemplary or punitive damages flowed from delicts and the general law of obligations and criminal penalties flowed from crimes; it was pointless to call an act a crime unless it entailed the necessary penal sanctions; some internationally wrongful acts were more serious than others but that did not necessarily make them crimes; and internationally wrongful acts of a serious nature could be compensated for by damages reflecting the serious nature of the acts.

315. Some members also expressed concern that any attempt to punish the State for its crimes, rather than those of its leaders who were responsible for the crimes, could in practice result in collective punishment. Punishing a State that was not a democracy was described as tantamount to punishing innocent people and forcing them to bear a burden of guilt for generations for an act in which they might be in no way implicated. However, other members did not consider it unacceptable to envisage punitive measures against a State. It was suggested that greater attention should be given to the population of the State which suffered the consequences of the violation of breaches of international law of another State and which had no way of controlling or influencing the leaders of that State. It was also observed that, in practice, the population of an entire State was punished by measures adopted by the Security Council.

e. Rehabilitation

316. The view was expressed that the fifth element concerning avoiding stigmatizing a State with criminality overlooked today's reality. The view was also expressed that the concept of State crime could not be incorporated in the

draft on State responsibility because it would be unfair for a successor State to inherit acts characterized as a crime of its predecessor.

(v) The question of the rejection of the concept of State criminal responsibility

317. Several members thought the concept of State crimes was unnecessary and unworkable for the reasons given in relation to the present draft in subsection (d) (ii) above. In their view, the concept of State crime was inherently flawed; had no legal value; could not be justified in principle; was contradicted by the majority of developments in international law; was not essential to the Commission's task; was not adequately addressed in article 19, and attempting to do so would substantially delay work on the topic; would not be acceptable or ensure due process without a judicial or quasi-judicial institution that could adjudicate whether a State had committed a crime, which the international community was not prepared to accept; and would exacerbate disputes between States which would more readily refer to each other as criminals.

318. In contrast, other members favoured retaining the concept of State crimes for the following reasons: the notion of State crimes in terms of exceptionally serious violations which affected the international community as a whole and could not be addressed merely by compensation was not new and could be traced to developments beginning in the nineteenth century; the terms "delict" and "crime" had become part of the public consciousness and the corpus of international law and State responsibility; the notion of State crimes was part of an evolutionary process in international law and the development of the international community which was exemplified by such related concepts as obligations *erga omnes*, *jus cogens* and international solidarity; the concept of State crime served an important deterrent function which should be strengthened by addressing it in the draft articles; in fact States often committed crimes and some States were currently subjected to conditions that treated them virtually as criminal States; the deletion of the concept of State crimes would be retrogressive, would ignore important developments in international law and would be a disservice to the topic and to the rule of law in international relations.

(vi) Exclusion of the notion from the draft articles

319. There was some support for preserving the concept of State crime as a topic for separate treatment in the future which would enable the Commission to take account of future developments in international law. The remark was made that the Commission could not convert the draft articles into a comprehensive code of "criminal" and delictual State responsibility for three reasons: first, the draft articles were essentially concerned with "civil" responsibility, as

indicated by articles 3 (responsibility for omission or negligence), 10 (responsibility for ultra vires acts), 27 (responsibility for complicity in the absence of intent or mens rea) and 29 (consent as a circumstance precluding wrongfulness); second, the draft articles did not contain the essential components of a criminal justice system or essential principles of criminal law; and third, the draft articles did not do justice to the concept of State crime. It would therefore be preferable to complete a code of general responsibility in the current quinquennium and to request a new mandate to embark upon a code of State criminal responsibility in the strict sense. The necessity of obtaining a new mandate for such an undertaking was questioned by some members. In contrast, other members believed that the deletion of article 19 would not prevent future consideration of the concept of crimes of States and there was no reason to encourage the consideration of the concept, whether as an element of State responsibility or otherwise.

320. There were different views concerning the inclusion and possible content of a savings clause if the Commission decided to delete the concept of State crimes. It was suggested that the draft should include such a clause clearly indicating that the Commission recognized the existence of State crimes and did not reject article 19, similar to article 4 of the draft Code of Crimes against the Peace and Security of Mankind adopted in 1996. Alternatively, it was suggested that it would be more appropriate to indicate that the deletion of article 19 was without prejudice to the possible future development of the notion of State crime outside the existing draft articles either as a separate topic for the Commission, through State practice or through the practice of international organizations. However, it was also stated that if the rationale was to avoid an a contrario conclusion the deletion of article 19 was without prejudice to the possible utility of the concept of crimes in some other context. Such a decision could not be founded on the basis that the Commission was dealing only with general law of obligations, which most legal systems treated separately from crimes.

321. Other members were against the exclusion of the notion concerning the distinction between delicts and crimes from the draft articles for reasons explained above, in particular in paragraph 318.

6. Concluding remarks of the Special Rapporteur on the debate concerning the distinction between "criminal" and "delictual" responsibility

322. The Special Rapporteur observed that the draft articles were unsatisfactory on nearly all accounts in their treatment of the broad field of multilateral obligations. There was general agreement in the Commission that the topic of

State responsibility was not limited to merely bilateral responsibility. However, the original vision that the Commission had had in formulating article 19 in 1976 had not been realized. At that time, the Commission had specifically excluded the "least common denominator" approach to international crimes, but in fact that was the approach subsequently adopted. Even those who supported the fundamental distinction between international crimes and international delicts embodied in article 19, paragraph 2, had not denied that there had been a diversion of intentions.

323. In considering the draft articles on second reading, the Commission was faced with the serious problem of differences of opinion on article 19. It would be unconstructive to resolve the question by a vote at the current stage; there was significant support for the various positions taken. The disagreement among members was obvious, and an indicative vote would not only be very undesirable but would not resolve the problem. The Special Rapporteur understood the concern regarding the continual pursuit of compromise solutions, but that was inevitable in a deliberative body such as the Commission. The Commission could produce constructive compromise solutions that could serve as the basis for further discussion by States, as demonstrated by those it had adopted on the international criminal court.

324. The exceptionally rich debate on the topic had shown the complexity of the problems raised by article 19, and the reality of the issues raised by paragraph 2. To illustrate first of all the complexity of the concept of State crime, the Special Rapporteur mentioned cases where a single act could be considered as a "crime" against one State but as a "delict" against another because the two would be affected by its consequences to different degrees. As to paragraph 2, there was general agreement concerning the existence of obligations to the international community which should be duly reflected in the draft articles. The draft inherited from the "least common denominator" approaches the defect of treating the multilateral forms of responsibility effectively as bilateral forms: article 40, paragraph 3, converted the so called multilateral obligation into a series of bilateral obligations, which created a very severe problem, not just in theory, but also in practice, by licensing States that were injured in a general sense and that were not the primary States concerned to adopt unilateral approaches. The previous Special Rapporteur had been stymied by that issue after three years of work, and that had been a contributing factor in his resignation. Neither the Commission nor the Working Group had found a solution to the massive procedural difficulty that would exist if individual States were authorized severally to represent community interests without any form of control.

325. In sum, the Special Rapporteur wished to make five major points. First, there was dissatisfaction with the distinction between international crimes and international delicts, which had been the subject of many criticisms, including the confusing penal law connotations of the term "crime" and the inappropriateness of the domestic law analogy. The Commission appeared to be ready to envisage other ways of resolving the problem than by establishing a categorical distinction between crimes and delicts.

326. Second, there was general agreement concerning the relevance of the established categories of *jus cogens* and *erga omnes* obligations and the narrower scope of the first category as compared to the second. The International Court of Justice had formulated the idea of *erga omnes* obligations in its judgment in the *Barcelona Traction*[157] case in the context of a fundamental distinction with respect to very important norms. The examples it had given in its famous dictum had, in fact, been examples of norms currently regarded as *jus cogens*. The Court had not intended to indicate that the existence of *erga omnes* obligations depended on the existence of multilateral instruments or that the provisions of multilateral instruments necessarily applied *erga omnes*. Those two modern notions with respect to State obligations were assuredly part of the progressive development of the law and could have important implications within the field of State responsibility.

327. Third, there was general agreement that the present draft articles did not do sufficient justice to those fundamental concepts, particularly in article 40, which would certainly have to be redrafted. A further question was whether, within the field of *erga omnes* obligations or *jus cogens* norms, a further distinction should be drawn between more serious and less serious breaches. That distinction certainly made sense in relation to *erga omnes* obligations. The usefulness of such a distinction was less clear in respect of *jus cogens* norms. In respect of any norm whatever there could be a threshold problem: how extensive did a process have to be before it constituted genocide, for example, or a crime against humanity? But it was very hard to say that international law drew a further distinction within each of those categories between "serious" crimes against humanity or "serious" genocide and other cases. Article 19, paragraph 3, was a source of confusion in that regard.

328. Fourth, there was general agreement that the draft articles created significant difficulties of implementation which needed further reflection, such as the problems of dispute settlement; the relationship between the directly injured State and other States. In this regard it should be stressed that the

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[157] See note 144 above.

primary victims of violations of the most fundamental norms, such as the prohibition of genocide or the right of self-determination, were usually populations rather than other States. The violation of fundamental norms committed against populations or human groups inevitably posed serious questions of representation and exacerbated the problem of distinguishing between directly and less directly injured States. Given those difficulties of implementation, which must not be underestimated, the general regime of State responsibility was to some extent residual, and not just in relation to the most obvious case of aggression, which was expressly dealt with by the Charter. It was true that, in respect of collective obligations of a fundamental character, the rules of State responsibility might even have negative and not merely positive effects, for example, precluding the unilateral application of measures of enforcement by one or a few States. If the existence of a collective interest was recognized, the problem was in ensuring that the enforcement measures applied retained a collective character, which was a deficiency of article 40. Hence, the Commission should reconsider those problems, taking into account the proposal made by a number of members to adopt a more differentiated regime, for example distinguishing between cessation and reparation in connection with the rights of injured States.

329. Fifth, general agreement had emerged between the two groups of members who had expressed diverse views in the discussion, that article 19 did not envisage a distinct penal category, and that at the current stage of the development of international law the notion of "State crimes" in the penal sense was hardly recognized. Both sides had endorsed the proposal, which the Commission had itself approved in 1976, namely that State responsibility was in some sense a unified field, notwithstanding the fact that distinctions were made within it between the obligations of interest to the international community as a whole and obligations of interest to one or several States. The Special Rapporteur retained the firm conviction that, in the future, the international system might develop a genuine form of corporate criminal liability for entities, including States. Most members of the Commission had refused to envisage that hypothesis and had spoken out in favour of a two-track approach which entailed developing the notion of individual criminal liability through the mechanism of ad hoc tribunals and the International Criminal Court, acting in complementarity with State courts, on the one hand, and developing within the field of State responsibility the notion of responsibility for breaches of the most serious norms of concern to the international community as a whole, on the other.

330. With regard to the genuine criminalization of State conduct, which had been described as a utopian project, the Special Rapporteur stressed that it was not

merely a question of labelling and that if the Commission was to return to it in the future, it must attach genuine penal consequences through genuine procedures.

7. Interim conclusions of the Commission on draft article 19

331. Following the debate, and taking into account the comments of the Special Rapporteur, it was noted that no consensus existed on the issue of the treatment of "crimes" and "delicts" in the draft articles, and that more work needed to be done on possible ways of dealing with the substantial questions raised. It was accordingly agreed that: (a) without prejudice to the views of any member of the Commission, draft article 19 would be put to one side for the time being while the Commission proceeded to consider other aspects of Part One; (b) consideration should be given to whether the systematic development in the draft articles of key notions such as obligations (*erga omnes*), peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19; (c) this consideration would occur, in the first instance, in the Working Group established on this topic and also in the Special Rapporteur's second report; and (d) in the event that no consensus was achieved through this process of further consideration and debate, the Commission would return to the questions raised in the first report as to draft article 19, with a view to taking a decision thereon.

8. Introduction by the Special Rapporteur of draft articles 1 to 4 of Part One

332. The Special Rapporteur noted that the report addressed two issues relating to the draft articles on State responsibility: questions of terminology that arose in respect of the articles as a whole, and recommendations concerning the general principles set out in articles 1 to 4 of Part One, chapter I.

(a) General observations on the process of second reading

333. The Commission was beginning the substantive discussion of the articles on State responsibility on second reading, which merited two observations. First, the Commission's practice was not to adopt a draft article definitively on second reading until all the draft articles had been adopted, since the draft articles had to be considered as a whole. Second, the Commission's consideration of the draft articles in Part One, particularly chapters I and II, was without prejudice to any conclusions that might be reached with respect to article 19. If a notion of international crimes of State in the proper sense was adopted, it would involve more extensive changes to Part One than were envisaged at the current stage.

(b) Questions of terminology

334. The Special Rapporteur noted that the draft articles contained no definitions clause. Instead the draft specified what the terms meant as required. The matter of a possible definitions clause could be revisited at a later stage. He also noted that terminology used in the draft articles had been questioned and drew attention to the tables included in the report containing the equivalents, in all working languages, of several key terms.

335. Although the phrase "internationally wrongful act" had its direct equivalent in five of the working languages of the United Nations, the Russian language version was closer to "internationally unlawful act". The term "internationally wrongful act" had been well established in the general debate on responsibility and should be retained. The Russian version might require reconsideration.

336. He suggested replacing the phrase "State which has committed an internationally wrongful act" by "wrongdoing State" for two reasons. First, that phrase was much more succinct. Second, the use of the past tense implied that the wrongful act had been completed, but the draft articles clearly also applied to wrongful acts of a continuing character. He noted that the International Court of Justice had used the term "wrongdoing State" in the Gabcikovo-Nagymaros Project[152] case.

337. The terms "injury" and "damage" required clarification as well. The draft articles referred to "injured State", not injury, and the term was defined in article 40 to mean a State which had suffered *injuria*, an injury in the broadest possible sense. Nowhere in the draft articles was there any indication that "injury" was a correlative to "damage": a State might be damaged without being injured, and vice versa. The word "damage" was used in the draft articles to refer to actual harm suffered, and a distinction was drawn between economically assessable damage and moral damage. That general concept of damage, covering both economically assessable and moral damage, ought to be distinguished from the term "injury", meaning *injuria* or legal wrong as such. Other questions of terminology arising in Part Two could be considered in due course.

(c) General and savings clauses

338. The draft articles contained three savings clauses, articles 37, 38 and 39, but none of them were in Part One. It had been suggested that those savings clauses should apply generally to the draft articles, especially article 37. Applying article 39 to the draft articles as a whole might also alleviate some of the difficulties raised by that article. While agreeing in principle with

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[152] See note 143 above.

these suggestions, the Special Rapporteur proposed reserving the question of general and savings clauses until those articles in Part Two were taken up.

(d) Title of Part One, chapter I

339. The Special Rapporteur indicated that the Drafting Committee might consider the suggestion to replace the title of Part One, "Origin of State responsibility", by "Basis of responsibility" since the word "origin" was somewhat unusual and had a broader connotation than merely an inquiry into issues of responsibility; it might be taken to refer to broader historical issues, as in the phrase "origins of the French revolution".

(e) Article 1

340. This provision was intended to cover all internationally wrongful conduct constituting a breach of an international obligation, whether arising from positive action or an omission or failure to act. There was no general requirement of fault or damage for a State to incur responsibility for an internationally wrongful act. Rather questions of damage or fault were referred to the primary rules. A general requirement of damage for international obligations would, in effect, convert all treaties into provisional undertakings which States could ignore if they felt that they would not thereby cause material damage to other States. Furthermore, violations in certain fields of international law, such as human rights law, usually did not entail damage to other States.

341. There were three important qualifications associated with the absence of a general requirement of fault or damage, which alleviated the legitimate concerns of States about vexatious claims, interference by non-interested States, etc. First, there were rules of international law where damage was an essential element of the obligation; it was simply that not all rules were of this type. Second, the question of less directly injured States or a multiplicity of injured States was a separate matter which arose in Part Two. Third, damage was not irrelevant to responsibility, for example, in terms of the amount and form of reparation or the proportionality of countermeasures.

342. While the draft articles were intended to deal with the topic of responsibility of States, Part One was not limited to the responsibility of States to other States and left open the question of entities other than States relying on that responsibility. However, there was nothing in the doctrine or case law to suggest that the secondary rules governing the responsibility of States to other persons in international law would be based on essentially different conditions than in the case of responsibility to other States. However, the obligation of a State was always correlative to the rights of one or more other States or persons. This precluded the possibility of abstract

responsibility, i.e. of responsibility in a vacuum. Although the scope of Part Two was limited to the rights of injured States, it was preferable for the purposes of Part One to state the notion of responsibility in "objective" terms, in conformity with the position long taken by the Commission.

343. The Special Rapporteur accordingly recommended that article 1 be adopted without change, subject to subsequent further consideration of its relation to the concept of "injured State" as defined in article 40 and applied in Part Two. He also noted that many of the observations concerning article 1 were also relevant to article 3.

(f) Article 2

344. This provision was a complete truism which had never been denied in any quarter. Its denial would amount to a denial of the principle of equality of States and of the whole system of international law. Moreover, the article did not deal directly with the topic of international responsibility but, rather, with the possibility of such responsibility. It was an example of the tendency towards over-refinement, which was one of the problems with the draft articles. He recommended deleting this unnecessary provision.

(g) Article 3

345. Article 3 was important both for structural reasons and for what it did not say. In particular it omitted any other general condition for responsibility apart from those referred to in its subparagraphs (a) and (b). Although the English word "act" did not normally connote both act and omission, as did the French term "fait", article 3 made it perfectly clear that "act" was used in the sense of both act and omission. The proposal to include "legal acts", or, rather, "acts in law", in subparagraph (a), was unnecessary since the current wording already covered acts in law and this point could be clarified in the commentary. Thus article 3 could likewise be adopted without change.

(h) Article 4

346. The proposition contained in article 4 had been repeatedly affirmed in international law beginning with the Alabama[153] arbitration. As the Permanent Court of International Justice had pointed out on many occasions, the characterization of an act as unlawful was an autonomous function of international law not contingent on characterization by national law and not affected by the characterization of the same act as lawful under national law. That did not mean that internal law was irrelevant to the characterization of conduct as unlawful; on the contrary, it might well be relevant in a variety of

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[153] Moore, International Arbitrations, vol. 1, p. 653.

ways. Noting the absence of any criticism of the article in the comments of Governments, he recommended its adoption without change.

347. In conclusion, the Special Rapporteur proposed that the Commission should, after debate, refer articles 1, 2, 3 and 4 to the Drafting Committee with the recommendation that articles 1, 3 and 4 be adopted without change and that article 2 should be deleted. The Drafting Committee might also give consideration to changing the order of the articles, so that article 3 would precede article 1, and to changing the title of Part One.

9. Summary of the debate on draft articles 1 to 4 of Part One

(a) Questions of terminology

348. Some doubts were expressed concerning the proposal to use the expression "wrongdoing State" given its possible connotations. Likewise the term "responsible State" was also not entirely satisfactory. It was suggested that, in French, the term "*État mis en cause*" might be used.

(b) Title of Part One, chapter I

349. Support was expressed for the proposal to amend the title. It was suggested that in the French version the term "basis" should be rendered as "*les fondements*".

(c) Article 1

350. There was support for maintaining article 1 without change.

351. A threefold objection to the concept of damage was expressed in support of the Special Rapporteur's proposal not to include a separate requirement of damage. First, a special damage requirement would *ex post facto* create confusion with regard to the primary rules which often did not contain such a requirement, especially in economic or material terms. Second, the more global concept of "*injuria*" and the injured State was preferable in the light of developments in international law since the Second World War, indicating that there could be liability without proof of special damage. Third, an overemphasis on the concept of damage would prejudice the useful concept of moral damage, particularly in the field of human rights.

352. Referring to the requirement of "fault", it was remarked that in English, fault or "*culpa*" did not always include an element of intention (*dolus*) and therefore the expression "fault or intention" could be useful in the commentary.

353. It was also observed that if the concept of the criminal responsibility of the State were to be maintained, the question of fault as a general requirement would have to be discussed again and the question of culpable intent (*mens rea*) would have to be dealt with in the context of State responsibility.

354. The Special Rapporteur noted that article 1 did not expressly mention the concept of fault but, paradoxically, that concept appeared to be present in the

term used in the French text. The problem did not arise in English because the term "wrongful" did not necessarily have the pejorative connotation of "fault". The Drafting Committee might consider the possibility of using the term "responsible State", which would offer the twin advantages of avoiding any negative connotation and of being concise.

(d) Article 2

355. There were different views concerning the proposed deletion of this article. It was suggested that the commentary should explain its deletion to avoid any misunderstanding.

356. The Special Rapporteur suggested that the idea underlying this provision, the important idea of the equality of States before the law, could be reflected in a preamble to the draft articles, as well as in the commentary.

(e) Article 3

357. The view was expressed that not only must conduct consisting of an action or an omission be attributable to the State under international law, as provided for in subparagraph (a), but the breach of the international obligation referred to in subparagraph (b) must also be assessed in the light of international law, and that was not expressly stated. It was therefore suggested that the article should read:

> "There is an internationally wrongful act of a State under international law when:
>
> (a) Conduct consisting of an action or omission is attributable to the State;
>
> (b) That conduct constitutes a breach of an international obligation of the State."

(f) Article 4

358. It was remarked that the second sentence did not indicate clearly that internal law must be in conformity with the provisions of international law and that the sentence should be replaced by more neutral wording, such as: "Internal law cannot, in this regard, take precedence over international law."

10. Introduction by the Special Rapporteur of draft articles 5 to 8 and 10 of chapter II of Part One

(a) Introduction

359. The Special Rapporteur noted that chapter II defined the conditions in which conduct was attributable to the State under international law. The articles contained in this chapter must be considered in the context of article 3, which set forth the two essential conditions for State responsibility: (a) an act or omission which is attributable to a State; and

(b) a breach of an international obligation of that State. Chapter II dealt with the first of those conditions.

360. Although the draft articles in chapter II had been thoroughly reviewed, it was reassuring to note that their basic structure and many of the formulations had not been challenged by State practice or judicial decisions over the past 20 years. Rather, the proposed changes in the draft articles were intended for the most part to clarify certain aspects and to deal with certain new problems, rather than to introduce any fundamental changes of substance.

361. The Special Rapporteur suggested that it was useful first to focus on articles 5, 6, 7, 8 and 10 concerning the ordinary and general conditions for attribution before turning to articles 9 and 11 to 15, which dealt with certain special problems, including the proposal for a new article 15 bis.

(b) Comments of Governments

362. Comments of Governments on articles 5 to 15 were quite substantial and were fully canvassed in the report.

363. A number of Governments expressed concern that the basis for attribution should be sufficiently broad to ensure that States could not escape responsibility based on formal definitions of their constitutive organs, particularly in view of the recent developments concerning the increasing delegation of public functions to the private sector, such as the maintenance of prison facilities. On the other hand, no Government had so far argued that the conditions for attribution should be more restrictively defined.

(c) Recent State practice

364. Since the articles contained in chapter II were adopted in the 1970s, there had been a number of important decisions and other relevant practice in that field of international law. It was important to ensure that any important developments were fully reflected.

(d) Terminology

365. The Special Rapporteur noted that the Commission had elected to use the term "attribution" rather than "imputability". The Drafting Committee might wish to consider using the term "imputability" given its use in subsequent decisions of the International Court of Justice and of other tribunals, which might imply that the term "attribution" had failed to gain acceptance. However, the Special Rapporteur preferred to retain the term "attribution", which reflected the fact that the process was a legal process; by contrast, the term "imputability", at least in English, implied, quite unnecessarily, an element of fiction.

366. The Special Rapporteur also suggested replacing the title of chapter II, "The 'act of the State' under international law", by "Attribution of conduct to

the State under international law" to correspond to article 3 and to avoid recalling the distinct notion of "act of State" recognized in some national legal systems.

(e) Basic principles underlying the notion of attribution

367. The Special Rapporteur drew attention to certain basic principles underlying the notion of attribution, namely the limited responsibility of the State, the distinction between State and non-State sectors, the unity of the State, the principle of lex specialis under which States could by agreement establish different principles to govern their mutual relations, and the distinction between attribution and breach of obligation, which was of fundamental importance.

(f) Article 5

368. Despite the proposal by one Government to replace the term "organ" with "organ or agent", the Special Rapporteur preferred to retain the distinction between organs and agents, which was addressed separately in articles 5 and 8 since different considerations applied to organs as compared with agents.

369. While noting that internal law was of primary relevance in determining whether a person or entity was to be classified as an organ, the Special Rapporteur agreed with a number of Governments that had suggested deleting the reference to internal law to avoid creating the impression that it was necessarily the decisive criterion. There were several reasons for doing so. First, internal law considered in isolation could be misleading, since practice and convention also played an important role in many legal systems. Second, internal law might not provide an exhaustive classification of State organs and indeed that law might not use the term "organ" in the same sense as international law for the purposes of State responsibility. Third, in some cases, narrow classifications of "organs" under internal law might amount to an attempt to evade responsibility, which under the principle in article 4 a State should not be able to do. The relevance of internal law as an important criterion could be explained in the commentary.

(g) Article 6

370. That article was not so much a rule of attribution as an explanation of the scope of the term "organ" in article 5. It made clear that State organs could belong to the constituent, legislative, executive, judicial or any other branch of government, that they could exercise international functions or functions of a purely internal character, and that they could be located at any level of government. Although any uncertainty concerning these issues had been resolved well before 1945, at least two of the elements were sufficiently important to merit explicit recognition. In addition, article 6 confirmed that all conduct

of a State organ acting as such was attributable to the State, without implying any limitation in terms of enumerated powers. Nor should there be any limitation or distinction for purposes of attribution of conduct to the State, in contrast to other areas of law, such as State immunity.

371. The reference in article 6 to the irrelevance of the distinction between functions of an international or an internal character was, however, unnecessary; it suggested too categorical a distinction between "international" and "internal" domains. The point was sufficiently obvious and undisputed; it could be sufficiently addressed in the commentary.

372. The reference to the "superior or subordinate" position of an organ was too narrow since it could be viewed as excluding intermediate or independent and autonomous organs. The Special Rapporteur considered it preferable to clarify that provision by referring to all State organs "whatever their position in the organization of the State".

373. The Special Rapporteur recommended that articles 5 and 6 be retained with the proposed drafting changes and combined in a single article, since the latter was really an explanation of the former rather than a distinct rule of attribution.

(h) Article 7

374. Paragraph 1 stated the well-established principle that the conduct of an organ of a territorial governmental entity was part of the structure of a State, even though it enjoyed a degree of autonomy within the State. That provision could, however, be deleted since the acts of such an entity were attributable to the State under the more clearly formulated article 5.

375. Paragraph 2 dealt with entities that were not part of the State but nonetheless exercised governmental authority, a situation which was of increasing practical importance given the recent trend towards the delegation of governmental authority to private-sector entities. That provision had not been subject to any criticism by Governments; if anything, the concern was that the provision should be sufficiently broad to encompass the proliferation of those diverse entities. However, on balance the existing provision seemed to cope with the various difficulties, especially when read with article 8. The Special Rapporteur recommended that the provision be retained, and that the notion of governmental authority be further clarified in the commentary, inter alia, to reflect the diverse recent practice.

(i) Article 8

376. When an entity acted on behalf of a State pursuant to express instructions, its actions were clearly attributable to the State under paragraph (a). The question arose whether the conduct should also be attributable to the State when

the entity acted under its direction and control. The subsequent jurisprudence provided some support for replacing the express authorization test by a broader effective control test. The Special Rapporteur recommended clarifying the paragraph to cover both situations of actual instructions and cases of direct and effective control where there was a nexus to the act in question. On the other hand, the provision should not be so widely drafted as to risk covering the activities of State-owned corporations, whose activities were not, in fact, directed or controlled by the State.

377. Paragraph (b) covered the rare but important case where a person or entity exercised governmental authority in the absence of an effectively functioning Government. However, the formulation of that provision was somewhat paradoxical since it suggested that potentially unlawful conduct entailing State responsibility was nonetheless "justified". The Special Rapporteur recommended retaining that provision with a clarifying amendment to replace the term "justified" with "called for".

(j) Article 10

378. That article addressed situations of unauthorized or ultra vires conduct, which was nonetheless attributable to the State provided that the conduct was performed "under cover" of the official capacity. The law of treaties took a strict view of the extent to which States could rely on their internal law to escape their international obligations; a fortiori this should be the case in the law of State responsibility. Subsequent jurisprudence and comments of Governments indicated universal support for that principle. The Special Rapporteur recommended retaining the provision; the Drafting Committee might, however, consider using the phrase "acting in or under cover of that official capacity" to cover the notion of apparent capacity, and amending the concluding phrase to read "even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise" for reasons of clarity and consistency with the proposed deletion of the reference to internal law in article 5.

11. Summary of the debate on draft articles 5 to 8 and 10 of chapter II of Part One

(a) General remarks

379. There was broad support for the Special Rapporteur's general approach to the articles contained in chapter II of Part One. Satisfaction was expressed with the absence of any serious or far-reaching changes in the draft, which had been cited with approval by the highest judicial bodies and had achieved widespread acceptance.

(b) Terminology

380. Support was expressed for retaining the term "attribution" rather than "imputability", as recommended by the Special Rapporteur.

381. In contrast, certain members asked whether the notion of "imputability" might be more appropriate in cases such as those covered by article 10 or in cases of vicarious liability. Some support was also expressed for the term "imputability" in the light of the relevant jurisprudence. It was suggested that both terms could be used in the draft articles and commentary as appropriate.

(c) Title of chapter II

382. Support was expressed for the proposed new title of the chapter as a more accurate indication of its content and as a way to avoid possible confusion with the "act of State" doctrine.

(d) Article 5

383. There was some support for the proposed deletion of the reference to internal law, as it was considered confusing and misleading, and instead clarifying the matter in the commentary. The view was expressed that the important role of internal law in determining the structure of the State should not be overestimated since international law played the decisive role in that determination for purposes of international responsibility, as indicated by the relevant jurisprudence cited in the report. Other cases where internal law had been disregarded included the Bantustans under the former apartheid regime in South Africa. Although those had been classified by South African law as independent and not as "organs" of the State, that classification had been ignored and rejected by the international community and by national courts in third States. While there was support for the proposed deletion for reasons of legal certainty, the view was also expressed that the term "internal law" was sufficiently broad to cover practice.

384. However, there was considerable concern regarding the proposed deletion, given the essential relevance of internal law in determining the organs of a State. It was remarked that the organs of a State could only be defined by its internal law. It was also remarked that the reference was the raison d'être for that article, which was consistent with the right of States to determine their own internal structure in the absence of any a priori definition of State structure under international law. Different views were expressed concerning the relevance of the principle of self-determination and the legal personality of the State in that regard.

385. There were also different views as to whether the deletion of the reference to internal law was justified by the possibility that States would attempt to

avoid responsibility by relying on their internal legal structures and, in particular, by ex post facto changes therein. However, the view was expressed that those matters were sufficiently addressed by articles 4, 7 and 8.

386. The necessity of the proposed introductory clause "For the purposes of the present articles" was questioned; on the other hand, it was pointed out that attribution for the purposes of State responsibility was a different exercise than attribution for the purposes of the law of treaties or unilateral acts.

387. While support was expressed for retaining the final clause of article 5, it was also described as unnecessary and too restrictive. There were different views concerning the proposed reformulation of the final clause. On the one hand, support was expressed for the reformulation as a useful clarification stated in more neutral terms. On the other hand, a question was raised as to the necessity and usefulness of referring to the functions and positions of State organs. According to that view, article 6 could simply be deleted and covered in the commentary.

388. It was suggested that, in the proposed definitions clause, it would be useful to define the term "State" to mean "any State according to international law, whatever its structure or organization whether unitary, federal or other". It was also suggested that the reference to the formal structure of the State in article 7 should be taken into account in referring to a State entity in article 5. It was further suggested that the notion of State entity could be clarified in the commentary.

(e) Article 6

389. There was support for deleting article 6 and combining it with article 5, as proposed by the Special Rapporteur. However, the view was also expressed that article 6 should be retained as a separate article in view of the importance of the principle reflected therein.

(f) Article 7

390. Agreement was expressed with the importance attributed by the Special Rapporteur to addressing the complex problem of delegating State functions to the private sector, with a question being raised as to whether it should be addressed under article 7, paragraph 2, or elsewhere. The view was expressed that it was difficult to define a priori the functions of a State because of the continuing evolution in the functions reserved for the public sector and those delegated to the private sector. Attention was also drawn to three different situations in that evolutionary process: (a) the State maintained a monopoly over its functions while delegating the exercise of some of them to public or private entities; (b) the State entirely abandoned its functions and handed them over to the private sector; and (c) the State retained its functions, but at the

same time allowed parallel functions to be exercised by the private sector to encourage competition.

391. There were different views concerning the proposed deletion of the reference to territorial governmental entities. Some members emphasized the importance of including territorial governmental entities such as constituent units of a federal State, which were not the same as State organs. It was considered particularly important to confirm that the acts of those organs were attributable to the State on the same basis as organs of the central Government, even if they enjoyed the greatest degree of autonomy and had sufficient independent legal capacity to act on their own at the international level, for example, by entering into agreements. Attention was also drawn to regional entities of a State which might conclude transborder agreements. The view was expressed that the matter was of sufficient importance to merit its inclusion in the article under discussion. The concern about a possible overlap with article 5 could be addressed by including the reference to territorial governmental entities in article 5 itself. However, concern was expressed about addressing the matter in article 5, which could entail complicated drafting, lessen the clarity of article 5 and create undesirable a contrario implications.

392. The view was expressed that it would be preferable to use the term "functions", which was broader than the term "governmental authority", or at least to clarify the use of the latter term in the commentary. Conversely, it was pointed out that the replacement of the term "functions" by "governmental authority" could lead readers to believe that the draft articles concerned acta jure gestiones, which was not self-evident and should in any case be made clear in the commentary.

393. In expressing support for retaining the proviso contained in the final clause, it was suggested that the proviso could be clarified by adding the phrase "it is established that" after the word "provided".

(g) Article 8

394. Some members were of the view that the situations covered by the article needed to be clarified in both the text and the commentary. It was important to ensure that the provision was sufficiently broad to cover situations such as those addressed by the International Court of Justice in the Nicaragua[154] case and the cases of disappearances in Latin America, which presented particularly difficult evidentiary problems and where evidence of actual instructions would naturally be difficult or impossible to obtain. Attention was drawn to

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[154] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14.

situations in which States facilitated or encouraged individuals or groups to commit unlawful conduct without giving formal explicit instructions, or even exercising direct control.

395. Support was expressed for the Special Rapporteur's proposal to amend article 8 (a) to reflect the control test, with attention being drawn to the varying degree of sufficient control required in different specific legal contexts. While supporting the proposed text, a question was raised as to whether it would cover situations in which a State set up a puppet State which was subject to its political control when there was no overt military control and the internal law of the former indicated that it was not responsible for the latter. It was emphasized that "puppet States" should not be equated with territorial governmental entities.

396. On the other hand, concern was expressed that the proposed clarification could, contrary to the underlying intentions behind the proposal, result in a narrower and more rigid rule of attribution which would make it more difficult to determine responsibility. In response to the concern that the new formulation might be too restrictive, attention was drawn to two complementary factors, namely the new proposed article 15 bis and the responsibility of a State for the failure to prevent the actions of groups or individuals that were not attributable to it.

397. A preference was expressed for retaining the term "justified" in article 8 (b).

398. A question was raised as to whether the use of the phrase "in fact" in article 8 (a) and (b) was necessary. On the other hand, it was pointed out that paragraph (a) of article 8 at least was concerned with cases of de facto authority and therefore the phrase was useful.

(h) Article 10

399. The view was expressed that territorial governmental entities should not be included in the article.

400. A preference was expressed for retaining the term "competence", subject to further clarification in the commentary, rather than the term "authority", which might be narrower. It was also remarked that the French version of the term "competence" indicated a power exercised within a legal framework in contrast to a power exercised in fact.

12. The Special Rapporteur's concluding remarks on the debate on draft articles 5 to 8 and 10 of chapter II of Part One

401. As regards the title of chapter II, the Special Rapporteur noted that there was general agreement concerning the proposed amendment.

402. With regard to article 5, it was necessary to respond to the serious concerns raised by Governments about precluding a State from escaping responsibility for an entity which was in truth an organ because it was not labelled as such under internal law or might even be mischaracterized. In that regard, it was necessary to recognize the complementary role played by national and international law concerning the notion of the organ of a State. On the one hand, the term "organ" had a particular meaning in international law. On the other hand, the content of the organ of the State largely depended on the internal structure of the State as determined by internal law, including practice and convention within that State.

403. It was considered useful to use the formula "acting in that capacity" in article 5, to emphasize the distinction between the usual cases involving State organs covered by article 5 and the exceptional cases involving other entities covered by article 7, paragraph 2.

404. Regarding article 6, there seemed to be broad support for combining that provision with article 5.

405. As to article 7, territorial governmental entities could best be dealt with in article 5 to avoid any suggestion of overlap between those provisions while addressing the concerns expressed regarding the proposed deletion of article 7, paragraph 1. In addition, the conduct of entities covered by article 7, paragraph 2, clearly required more detailed consideration.

406. As regards article 8, it was necessary to ensure that the scope of paragraph (a) was sufficiently broad and sufficiently precise in view of the importance of that provision and the questions raised by subsequent jurisprudence. The proposed clarification to article 8 (a) had been intended as an amplification, not a narrowing, of the previous formulation, having regard in particular to the discussion of the issues in the Nicaragua[165] case. The Drafting Committee could, however, discuss whether some other formulation was to be preferred.

407. There seemed to be no objections to article 8 (b), which was a well-established principle recognized in the relevant jurisprudence. However, consideration should be given as to whether the proposed title of article 8 accurately reflected the content of that provision.

408. While article 10 reflected a universally agreed principle, its formulation might be improved, and useful suggestions in that regard had been made in the debate.

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[165] Loc. cit.

13. Introduction by the Special Rapporteur of draft articles 9 and 11 to 15 bis of chapter II of Part One

(a) Introduction

409. The Special Rapporteur noted that four of the articles provided that conduct was not attributable to the State unless otherwise provided by other articles. The negative formulations contained in those four articles were devoid of content, since under article 3 it was necessary that conduct should be attributable to the State. There was also the question why the particular elements referred to, especially in articles 12 and 13, were singled out as a basis for "non-attribution". Those articles were largely unnecessary and should be deleted.

410. The remaining articles addressed four special problems concerning, respectively, attribution with respect to the organ of a State acting on behalf of another State (articles 9 and 12), international organizations acting on behalf of a State (articles 9 and 13), insurrectional movements (articles 9 and 15) and other cases (articles 11 and 15 bis).

411. The Special Rapporteur's recommendations were intended to retain all of the substantive content of those articles and to make certain additions to take account of State practice since their adoption.

(b) Articles 9 and 12

412. Article 9 provided that when a State lent one of its organs to another State, the conduct of the organ was attributable to the receiving State. The relatively diverse practice was reflected in the examples cited in the report. As emphasized in the commentary, that was a narrow concept which required that the organ actually be placed at the disposal of another State; that implied both that the organ should be carrying out the purposes of the receiving State and that it should be, at least at the level of policy if not of detail, under the control of that State. That limited but useful provision should be retained so far as it related to the organs of States.

413. Article 12 was an unnecessary negative formulation; it should be deleted, and the issues that it raised should be addressed in the commentary to article 9.

(c) Articles 9 and 13

414. Article 9 also addressed situations in which an organ of an international organization was placed at the disposal of a State. It was difficult to find examples of such cases, which, at least according to some international organizations, including the United Nations itself, were inconceivable. The Special Rapporteur noted that a number of complex questions had arisen in recent years concerning the responsibility of States in relation to international

organizations. However, those questions should be addressed in the context of the law of international organizations. He therefore recommended deleting that element from the draft and adding a savings clause (article A) which would make it clear that the draft articles were without prejudice to the responsibility of international organizations or of States for the conduct of international organizations.

415. Article 13 was the second unnecessary negative formulation that should be deleted.

(d) Articles 14 and 15

416. Article 15 contained two positive rules of attribution concerning insurrectional movements. In that instance, it was reasonable to begin with the negative proposition that, as a general rule, the acts of an insurrectional movement were not attributable to a State subject to the two exceptions: thus, old articles 14 and 15 would be combined into one. As to the exceptional cases, it was important to distinguish between the exceptional case in which the insurrectional movement succeeded in becoming the Government of the targeted State, on the one hand, and cases in which the insurrectional movement became part of a national reconciliation Government, on the other hand. If the Government of a State could only bring elements of an unlawful opposition movement into a new Government at the expense of assuming all the liabilities of the opposition movement, that would tend to discourage steps towards conflict resolution and national reconciliation. The exception should therefore only apply in the narrow case where the opposition movement actually defeated and replaced the Government of the State concerned.

417. The Special Rapporteur proposed that the exception should only be limited to "the conduct of an organ of an insurrectional movement" which was "established"; it should not apply to the uncoordinated conduct of its supporters.

418. Article 15 had been criticized in the literature for failing to distinguish between national liberation movements and other insurrectional movements which did not have any international status or recognition. That criticism failed to distinguish between the question of attribution and the question of the obligations incumbent upon certain movements, especially those whose higher status might be associated with greater responsibilities under international humanitarian law. That matter could be addressed in the commentary.

(e) Articles 11 and 15 bis

419. Article 11 was the fourth unnecessary negative formulation that should be deleted, and the rich commentary should be incorporated in the commentary to article 15 bis. In addition, article 11 was problematic because it indicated

that the conduct of private individuals was not attributable to the State, which was not true in all cases. It was important to indicate clearly the limited extent to which private conduct was attributable to the State, but that could be done by other means.

420. Article 15 bis was intended to cover cases in which private conduct was subsequently adopted or acknowledged by the State, as in the Lighthouses[156] or Hostages[157] cases. It was important to distinguish between conduct that was merely endorsed in terms of general approval and conduct that was actually adopted by the State in the strong sense of article 15 bis, and the language "acknowledged or adopted as its own" was intended to achieve that. Those cases did, in fact, occur with some frequency.

14. Summary of the debate on draft articles 9 and 11 to 15 bis

421. Many members endorsed the excision of the negative formulations and the streamlining of the text as significant improvements.

(a) Article 9

422. Members drew attention to the need to ensure that the article was sufficiently broad to cover a variety of situations. A question was raised as to whether article 9 covered cases in which a State exercised consular relations in the interest of or on behalf of another State. The view was expressed that the article should address the relatively common phenomenon of the partial representation by one State of another State in a limited area to clarify the responsibility of the representing and represented States. It was suggested that the complex situations in which an organ exercised functions within its own competence on behalf of another State might require further consideration.

423. A question was also raised as to whether the article should cover cases in which a State was required to act by a decision of an international organization.

424. Support was expressed for the proposed retention of the article without reference to international organizations and for the proposed savings clause with respect to international organizations.

(b) Article 11

425. Support was also expressed for the proposed deletion of the article as unnecessary.

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[156] United Nations, Report of International Arbitral Awards, vol. XII, p. 160.

[157] United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980, p. 3.

(c) Article 12

426. Support was further expressed for the proposed deletion of the article as unnecessary. On the other hand, the view was expressed that the article should be reformulated to address the points raised in paragraphs 249 to 255 of the first report of the Special Rapporteur.

(d) Article 13

427. Support was expressed for the proposed deletion of the article as unnecessary and as consistent with the scope of the draft indicated by article 1, with importance being attached to the inclusion of the proposed savings clause.

428. A doubt was expressed concerning the proposed deletion of the article, with attention being drawn to two problems concerning the relationship between States and international organizations. First, there was the problem of States attempting to hold the headquarters State responsible for acts taken by international organizations within its territory. Second, there was the problem of a non-member State recognizing the responsibility of an international organization, which entailed the implicit recognition of its legal personality or status. If those matters were not addressed, it was considered essential to include the proposed savings clause.

429. According to another point of view, the draft was exclusively concerned with State responsibility and it was therefore not relevant to specify the exclusion of the responsibility of international organizations.

(e) Articles 14 and 15

430. Agreement was expressed with the proposed merger of articles 14 and 15.

431. Some members questioned the use of the term "insurrectional movement". The view was expressed that the term was outdated; moreover, the commentary did not reflect decolonization practices since the 1960s. The view was also expressed that the article failed to distinguish between insurrectional movements and national liberation movements which had achieved international recognition and status.

432. The remark was also made that even if the same responsibility regime applied to an insurrectional movement and a national liberation movement, the terms could not be equated given the negative connotation of the former and the positive connotation of the latter. It was suggested that consideration should be given to the responsibility implications of the recognition of an insurrectional movement or national liberation movement, possibly in Part Two of the draft. It was also suggested that an attempt should be made to find a new term.

433. A wide spectrum of civil strife was noted, ranging from internal disturbances and mob violence to an insurrectional movement or even an established de facto government on part of the territory of a State. Those distinctions needed to be clearly delineated. The view was also expressed that State responsibility was a function of effective control, not lawful control, as indicated in the Namibia[158] case, and that, in consequence, the question of the status of insurrectional movements was beyond the scope of the current topic; to introduce it here would only complicate the task and create quite unnecessary difficulties. The draft should address legal questions relating to attribution in general terms to cover a variety of cases and not political questions relating to insurrectional movements.

434. It was suggested that the terms "insurrectional movement" and "national liberation movement" were both largely outdated, and that caution was advisable in discarding those terms in favour of a new term that might also date quickly. It was thus suggested that the term "insurrectional movement" could be retained in the absence of a suitable, equally broad alternative.

435. As regards paragraph 1, it was remarked that the territorial host State could be held responsible for neglecting to prevent acts of an insurrectional movement in its territory against another State. Even if the State could not be held responsible for the acts of an insurrectional movement, it could be held responsible for its own omissions in failing to prevent uncontrolled forces from causing damage in certain cases. It was also remarked that the State should be held responsible when some factions of the Government were involved in some way with or otherwise supported a rebel group which caused injury to another State or third parties, and that the draft should address the different variations, possibly in a separate article.

436. In contrast, the view was expressed that it was impossible to address every variation and that the article should do no more than establish the limits of attribution to the State in the case of insurrectional movements: remaining issues were a matter for the primary rules. The view was also expressed that it was a conceptual error to refer to State responsibility for the acts of an insurrectional movement, in contrast to the failure of the State to take the necessary preventive measures, and that such matters could be adequately addressed in the commentary.

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[158] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16.

437. Support was expressed for retaining article 15, paragraph 3, dealing with the responsibility of insurrectional movements themselves. A doubt was expressed concerning the proposed deletion of the "without prejudice" clause in paragraph 3 and the possibility of not taking account of the relevance of such issues in recent years and their influence on the development of, inter alia, international humanitarian law.

438. As to the cases where conduct of an insurrectional movement was attributable to the State, consideration should be given to addressing cases in which the insurrectional movement became part of the new Government or was granted a degree of autonomy within the State structure by the Government.

439. It was suggested that consideration should be given to including a "without prejudice" clause to ensure absolute clarity as to the continuing role of the primary rules, particularly those relating to the obligations of result of a State with respect to insurrectional movements. Depending on the obligation, a State was often not relieved from responsibility owing to insurrection or civil strife.

440. A concern was expressed regarding proposed article 15, with paragraph 1 being described as unclear, the reference to the insurrectional movement succeeding in becoming the new Government being questioned as unnecessary in view of article 15 bis, and the reference to at least some of the preceding articles being questioned as unnecessary and irrelevant.

441. A question was raised concerning the use of the term "established" in the chapeau of the proposed article 15. It was suggested that the phrase "established in opposition" was self-evident and unnecessary. The view was also expressed that the term "established" should be interpreted to refer to the moment when an insurrectional movement exercised effective control over part of the territory of a State, and that the responsibility of the State continued up until that moment.

(f) Article 15 bis

442. Support was expressed for the proposed article as addressing an important lacuna in the draft. However, the comment was made that article 15 bis should be concerned with cases where the acknowledgement of the earlier conduct amounted to a form of recognition of an existing situation, i.e. where it had a probative value, as distinct from cases where the adoption of conduct occurred de novo without any earlier involvement by the State.

443. It was suggested that the article could be redrafted as a positive formulation. It was also suggested that a savings clause concerning the responsibility of insurrectional movements or national liberation movements should be included as article 15 bis, paragraph 2, or article 15 ter.

444. A question was raised concerning the necessity of that provision and the use of the word "or" rather than "and" in the concluding phrase.

15. The Special Rapporteur's concluding remarks on the debate concerning articles 9 and 11 to 15 bis

445. The Special Rapporteur noted that many useful comments had clarified and illuminated the general understanding of those articles. He noted that the articles created few major problems of principle, with the possible exception of article 15.

446. There was general agreement that the responsibility of international organizations and of States for acts of international organizations were important subjects that were worthy of study in their own right but that they raised problems that went well beyond questions of attribution. The wisest course of action would be to exclude them from the current draft. That exclusion necessitated a savings clause since attribution issues were involved. It had been suggested that the savings clause should cover acts carried out within the framework of an international organization as well as the acts of the international organization itself. On the other hand, States could assume individual responsibilities in the context of conduct which took place in the forum of an international organization, and that distinction needed to be recognized.

447. Article 9 had received general approval. Although some examples or organs placed at the disposal of another State might be considered vestiges of colonialism, there were other examples where the consent of the States concerned had been given freely. The omission of the article would create problems concerning the breadth of article 5.

448. There was general agreement that the negative formulations contained in articles 11 to 14 were unnecessary and could be deleted, with any useful elements being addressed in the commentary. The problem raised concerning the conduct of one State in the territory of another State required further reflection, possibly in chapter IV of Part One.

449. There was also general agreement concerning the proposed merger of articles 14 and 15. The Drafting Committee should consider whether new article 15 should be formulated in the negative or in the positive. Given the general support for retaining the reference to territorial governmental entities in article 5, consideration should be given to the relationship between articles 5 and 15. The Special Rapporteur still believed that the term "established" was necessary to indicate a threshold for the insurrectional

movements for purposes of article 15, and to distinguish between territorial governmental entities and de facto administrations covered by articles 5 and 15 respectively.

450. Questions of terminology raised with respect to the terms "insurrectional movements" and "national liberation movements" should be considered by the Drafting Committee. It might be necessary to include a brief introductory article in the draft to indicate that its scope was limited to the responsibility of States and did not extend, for example, to the responsibility of insurrectional movements.

451. Finally, there was general agreement concerning the need for proposed article 15 _bis_.

CHAPTER VIII

NATIONALITY IN RELATION TO THE SUCCESSION OF STATES

A. Introduction

452. At its forty-fifth session (1993), the Commission decided to include in its agenda the topic entitled "State succession and its impact on the nationality of natural and legal persons".[159] The General Assembly endorsed the Commission's decision in paragraph 7 of resolution 48/31 of 9 December 1993, on the understanding that the final form to be given to the work on the topic shall be decided after a preliminary study is presented to the Assembly. At its forty-sixth session (1994), the Commission appointed Mr. Václav Mikulka Special Rapporteur for the topic.[160]

453. At its forty-seventh (1995) and forty-eighth (1996) sessions, the Commission considered the Special Rapporteur's first and second reports.[161] The Commission established at its forty-seventh session a Working Group entrusted with the mandate to identify issues arising out of the topic, categorize those issues which are closely related thereto, give guidance to the Commission as to which issues could be most profitably pursued given contemporary concerns and present the Commission with a calendar of action.[162] The Working Group completed its task as regards the preliminary study of the topic at the forty-eighth session.

454. The Commission decided, at the forty-eighth session, to recommend to the General Assembly that it take note of the completion of the preliminary study of the topic and request the Commission to undertake the substantive study of the topic entitled "Nationality in relation to the succession of States" in accordance with the proposed plan of action, which, inter alia, envisaged: (a) that consideration of the question of the nationality of natural persons would be separated from that of the nationality of legal persons and that priority would be given to the former; and (b) that the decision on how to proceed with respect to the question of the nationality of legal persons would be taken upon completion of the work on the nationality of natural persons and in the light of the comments that the General Assembly might invite States to

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[159] Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10), para. 440.

[160] Ibid., Forty-ninth Session, Supplement No. 10 (A/49/10), para. 383.

[161] Respectively document A/CN.4/467 and A/CN.4/474 and Corr.1 and Corr.2 (Chinese only).

[162] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 147.

submit to it on the practical problems raised by a succession of States in the field.[163] The General Assembly endorsed the Commission's recommendations in paragraph 8 of its resolution 51/160 of 16 December 1996.

455. At its forty-ninth session (1997), the Commission considered the Special Rapporteur's third report,[164] containing a set of draft articles with commentaries on the question of the nationality of natural persons in relation to the succession of States. At the same session, the Commission adopted on first reading a draft preamble and a set of 27 draft articles on nationality of natural persons in relation to the succession of States.[165] The General Assembly, in paragraph 2 (a) of its resolution 52/156 of 15 December 1997, drew the attention of Governments to the importance of having their views on the draft articles and urged them to submit their comments and observations in writing by 1 October 1998.

B. Consideration of the topic at the present session

456. At the present session, the Commission had before it the Special Rapporteur's fourth report[166] dealing with the second part of the topic, i.e., the question of the nationality of legal persons in relation to the succession of States, which he introduced at the 2544th meeting, on 9 June 1998.

457. The Special Rapporteur observed that a preliminary exchange of views at the present session on possible approaches to the second part of the topic would facilitate the future decision to be taken by the Commission on the question, in particular given the fact that Governments had so far not submitted any written observations in response to the request contained in General Assembly resolution 52/156. In his report, following an overview of the discussion that had taken place so far on the issue both in the Commission and in the Sixth Committee, the Special Rapporteur had therefore raised a number of questions as regards the orientation to be given to the work on the nationality of legal persons and he suggested that they be discussed in the framework of a working group.

458. At its 2530th meeting, on 14 May 1998, the Commission established a Working Group[167] to consider the question of the possible orientation to be given to

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[163] Ibid., Fifty-first Session, Supplement No. 10 (A/51/10), para. 88.

[164] A/CN.4/480 and Corr.1 (French only) and Add.1 and Corr.1 and Corr.2 (French only).

[165] Official Records of the General Assembly, Fifty-second Session, Supplement No. 10 (A/52/10), chap. IV.C.

[166] A/CN.4/489.

[167] For the composition of the Working Group, see para. 8.

the second part of the topic in order to facilitate the Commission's decision on this issue. The preliminary conclusions of the Working Group, which were considered and endorsed by the Commission at its 2544th meeting, on 9 June 1998, are set out in paragraphs 460 to 468 below.

459. During the consideration of the Working Group's preliminary conclusions, several members expressed a preference for the second option, i.e. the study of the status of legal persons in relation to the succession of States, and encouraged the Special Rapporteur to examine it further in his next report concerning this part of the topic of nationality in relation to the succession of States.

Preliminary conclusions of the Working Group

460. The second part of the topic "Nationality in relation to the succession of States" includes the problem of the nationality of legal persons that the Commission has not yet studied. In the view of the Working Group, as the definition of the topic now stands, the issues involved in the second part are too specific and the practical need for their solution is not evident. In addition to considering the possibility of suggesting to the Commission not to undertake work on this part of the topic, the Working Group considered it useful to examine the possibility of alternative approaches, as they emerge from Part III of the fourth report of the Special Rapporteur.[166] The Group agreed that there were, in principle, two options for enlarging the scope of the study of problems falling within the second part of the topic, as explained below. They would both require a new formulation of the mandate for this part of the topic.

461. The first option would consist in expanding the study of the question of the nationality of legal persons beyond the context of the succession of States to the question of the nationality of legal persons in international law in general. As the notion of the nationality of legal persons was not known to all legal systems, it would be advisable for the Commission to examine also similar concepts on the basis of which the existence of a link analogous to that of nationality was usually established.

462. The benefits of such an approach would be that it would contribute to the clarification of the general concept of the nationality of legal persons in international relations. It would also enable the Commission to consider further in a more systematic manner the problems it had been confronted with when studying the topics of State responsibility, diplomatic protection and succession of States.

463. The problems that the Commission could encounter in opting for this approach would be the fact that, owing to the wide diversity of national laws in

this respect, the Commission would be confronted with problems similar to those that had arisen during the consideration of the topic of jurisdictional immunities. There would also be a certain overlap with the topic of diplomatic protection. Moreover, such a study would lend itself more to a theoretical analysis than to the development of rules of immediate practical applicability. But above all, the enormity of such a task should not be underestimated. It would be difficult to keep the study within manageable limits.

464. The second option would consist in keeping the study within the context of the succession of States, but going beyond the problem of nationality to include other questions, such as the status of legal persons (in particular rights and obligations inherent to the legal capacity of legal persons, including those determining the type of legal person, etc.) and, possibly, also the conditions of operation of legal persons flowing from the succession of States.

465. The benefits of such an approach would be, in the view of the Working Group, that it would contribute to the clarification of a broader area of the law of the succession of States.

466. In opting for this approach, the Commission would be confronted with the problem of the wide diversity of national laws in this respect. Once enlarged in this direction it would moreover be difficult to establish a new delimitation of the topic.

467. If work is continued under either option, the Commission has further to decide which categories of "legal persons" should be covered by the study, to which legal relations the study should be limited and what could be the possible outcome of the work of the Commission on this part of the topic.

468. In the absence of positive comments from States, the Commission would have to conclude that States are not interested in the study of the second part of the topic. In its report, the Commission should remind the General Assembly of the desirability of obtaining the reaction of States on the question raised in paragraph 5 of General Assembly resolution 52/156. The Assembly should, in particular, invite States having undergone a succession of States to indicate, e.g., how the nationality of legal persons was determined, what kind of treatment was granted to the legal persons which, as a result of the succession of States, became "foreign" legal persons, etc.

CHAPTER IX

RESERVATIONS TO TREATIES

A. Introduction

469. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its agenda the topic "The law and practice relating to reservations to treaties".

470. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic.[168]

471. At its forty-seventh session, in 1995, the Commission received and discussed the first report of the Special Rapporteur.[169]

472. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission's consideration of the topic; they related to the title of the topic, which should now read "Reservations to treaties"; the form the results of the study would take; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[170] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994.

473. In 1995, the Commission, in accordance with its earlier practice,[171] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.[172]

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[168] Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), para. 382.

[169] A/CN.4/470 and Corr.1.

[170] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 491.

[171] See Yearbook of the International Law Commission, 1993, vol. II (Part Two), para. 286.

[172] As at 30 June 1998, 32 States and 22 international organizations had answered the questionnaire.

474. At its forty-eighth session, the Commission had before it the Special Rapporteur's second report on the topic.[173] The Special Rapporteur had annexed to his report a draft resolution of the International Law Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[174] Owing to lack of time, however, the Commission was unable to consider the report and the draft resolution, although some members had expressed their views on the report. Consequently, the Commission decided to defer the debate on the topic until the next year.

475. At its forty-ninth session, the Commission again had before it the second report of the Special Rapporteur on the topic.

476. Following the debate, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[175]

477. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the International Law Commission of having their views on the preliminary conclusions.

B. Consideration of the topic at the present session

478. At the present session, the Commission had before it the Special Rapporteur's third report on the topic,[176] which mainly dealt with the definition of reservations (and of interpretative declarations) to treaties. The Commission considered the report at its 2541st, 2542nd, 2545th, 2548th and 2549th to 2552nd meetings, held on 4, 5, 10 and 12 June and 27, 28, 29 and 30 July 1998.

479. At its 2542nd, 2545th, 2548th, 2550th to 2552nd meetings held respectively on 5, 10, 12 June and 28, 29 and 30 July 1998, the Commission decided to refer draft guidelines 1.1 (Definition of reservations), 1.1.1 (Joint formulation of a

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[173] A/CN.4/477 and Add.1.

[174] Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 137.

[175] Ibid., Fifty-second Session, Supplement No. 10 (A/52/10), para. 157.

[176] A/CN.4/491 and Add.1-6.

reservation), 1.1.2 (Moment when a reservation is formulated), 1.1.3 (Reservations formulated when notifying territorial application), 1.1.4 (Object of reservations), 1.1.5 (Statements designed to increase the obligations of their author), 1.1.6 (Statements designed to limit the obligations of their author), 1.1.7 (Reservations relating to non-recognition), 1.1.8 (Reservations having territorial scope), 1.2 (Definition of interpretative declarations) and 1.4 (Scope of definitions) to the Drafting Committee.[177]

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[177] The text of these draft guidelines reads as follows:

"1.1 Definition of reservations

"1.1 'Reservation' means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

"1.1.1 Joint formulation of a reservation

"The unilateral nature of reservations is not an obstacle to the joint formulation of a reservation by several States or international organizations.

"1.1.2 Moment when a reservation is formulated

"A reservation may be formulated by a State or an international organization when that State or that organization expresses its consent to be bound in accordance with article 11 of the 1969 and 1986 Vienna Conventions on the Law of Treaties.

"1.1.3 Reservations formulated when notifying territorial application

"A unilateral statement which is made by a State at the time of the notification of the territorial application of a treaty and by which that State purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to the territory in question constitutes a reservation.

"1.1.4 Object of reservations

"A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which the State intends to implement the treaty as a whole.

"1.1.5 Statements designed to increase the obligations of their author

"A unilateral statement made by a State or an international organization by which that State or that organization undertakes commitments going beyond the obligations imposed on it by a treaty does not constitute a reservation [and is governed by the rules applicable to unilateral legal acts], even if such a statement is made at the time of the

480. At its 2556th to 2558th meetings, held from 5 to 7 August 1998, the Commission considered and adopted the report of the Drafting Committee on draft guidelines 1.1 (Definition of reservations), 1.1.1 [1.1.4] (Object of reservations), 1.1.2 (Cases in which a reservation may be formulated), 1.1.3 [1.1.8] (Reservations having territorial scope), 1.1.4 [1.1.3] (Reservations formulated when notifying territorial application), 1.1.7 [1.1.1] (Joint formulation of a reservation) and a draft guideline with no title or number concerning the relation between the definition and the permissibility of reservations. The text of these draft guidelines and of the commentaries relating thereto is reproduced in section C below.

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expression by that State or that organization of its consent to be bound by the treaty.

"1.1.6 Statements designed to limit the obligations of their author

"A unilateral statement made by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty and by which its author intends to limit the obligations imposed on it by the treaty and the rights which the treaty creates for the other parties constitutes a reservation, unless it adds a new provision to the treaty.

"1.1.7 Reservations relating to non-recognition

"A unilateral statement by which a State purports to exclude the application of a treaty between itself and one or more other States which it does not recognize constitutes a reservation, regardless of the date on which it is made.

"1.1.8 Reservations having territorial scope

"A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation, regardless of the date on which it is made.

"1.2 Definition of interpretative declarations

"'Interpretative declaration' means a unilateral declaration, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions.

"1.4 Scope of definitions

"Defining a unilateral declaration as a reservation or an interpretative declaration is without prejudice to its permissibility under the rules relating to reservations and interpretative declarations, whose implementation they condition."

1. Introduction by the Special Rapporteur of his third report

481. In introducing his third report, the Special Rapporteur recognized the delicate and difficult aspects of the topic from the point of view of legal technique. His report was divided into two chapters. The first was devoted to the earlier work of the Commission on the topic, and the second to the definition of reservations (and interpretative declarations) and to reservations (and interpretative declarations) to bilateral treaties.

(a) The earlier work of the Commission on the topic and reactions from States and organizations consulted

482. The Special Rapporteur referred to the Commission's previous work,[178] drawing attention to its two main decisions. First, in principle and subject to an unlikely "state of necessity", the Commission would not call into question the provisions of the Vienna Conventions on reservations to treaties and would simply try to fill the lacunae and, if possible, to remedy the ambiguities and clarify the obscurities in them. Second, the work would lead to the preparation of a Guide to Practice, a set of guidelines which would be grafted onto the existing provisions, filling the lacunae therein, and would, if necessary, be accompanied by model clauses relating to reservations which the Commission would, as appropriate, recommend to States and international organizations for inclusion in treaties they would conclude in future.

483. The Special Rapporteur discussed the action taken[179] on his second report[173] and on the principal reactions to the Commission's preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. He recalled that two schools of thought had emerged from the debates on the preliminary conclusions endorsed by the Commission, which had been adopted without a vote. On the one hand, a clear majority had felt that the Commission had already taken a big step forward in recognizing that the human rights treaty monitoring bodies were competent to comment upon and express recommendations with regard to the permissibility of reservations by States[180] and in calling upon States to cooperate with monitoring bodies and to give due consideration to their recommendations. On the other hand, a second group had urged the Commission to go further and recognize that monitoring bodies had the

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[178] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10).

[179] A/CN.4/491, paras. 9-30.

[180] See Official Records of the General Assembly, Fifty-second Session, Supplement No. 10 (A/52/10), para. 157, para. 5 of the preliminary conclusions.

right to draw the consequences of their findings, following the example of the European Court of Human Rights (*Belilos* case).

484. The Special Rapporteur felt that the divergence of views paralleled the division of States in the Sixth Committee, but along different lines. About half the States that had given their views on that point had approved the preliminary conclusions, while the other half had expressed reservations on the ground that States alone were competent, not only to determine the consequences of the possible impermissibility of a reservation, but even to find a reservation to be impermissible. The Special Rapporteur was convinced that it was part of the Commission's role to suggest progressive alternative solutions to States, provided they corresponded to trends that were desirable and had already taken reasonable shape. He drew the Commission's attention, however, to the opposition shown by States to the breakthroughs being recommended by some of its members in respect of human rights monitoring bodies.

485. The Special Rapporteur also said that he had so far received a response only from the Chairperson of the Human Rights Committee, who had sent in some initial comments on paragraph 12 of the preliminary conclusions, pointing out in that regard that universal monitoring bodies played no less important a role than regional bodies in the process by which the relevant practices and rules were developed.[181]

486. However, the Special Rapporteur considered it premature to reopen the debate on the preliminary conclusions, which the Commission would have to consider again; it would do well to wait, on the one hand, for the comments from States[182] and human rights bodies which it had requested, even if that meant reiterating the request, and, on the other hand, until the consideration of the question of the permissibility of reservations and reactions to them had been completed.

487. The Special Rapporteur said he had been favourably impressed by the interest which States had shown in the Commission's work on reservations to treaties. That interest was illustrated not only by the large number of statements made in the Sixth Committee, but also by the work done on the topic by the Asian-African Legal Consultative Committee (AALCC) and the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI), which

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[181] A/CN.4/491, para. 16.

[182] Four States had answered the questionnaire thus far, namely, China, Liechtenstein, Morocco and Switzerland.

had established a group of specialists on reservations to international treaties.[183]

488. Another proof of such interest was the large number of replies received from States (32) and international organizations (22) to the questionnaire on the topic. While expressing the hope that an even larger number of States and international organizations would reply, the Special Rapporteur regretted the silence of the European Communities thus far, which were not only depositaries, but also parties to many multilateral treaties.

489. Chapter II of the report was comprised of two sections, the first dealing with the definition of reservations to treaties and of interpretative declarations, and the second being devoted to reservations and interpretative declarations to bilateral treaties. Owing to lack of time, the Special Rapporteur had been unable to deal with "alternatives to treaties", as he had originally planned.

(b) Definition of reservations to treaties

490. The Special Rapporteur had taken as his starting point the definition of reservations in the three Vienna Conventions of 1969, 1978 and 1986 and, to begin with, that contained in article 2, paragraph 1 (d), of the 1969 Convention on the Law of Treaties. Referring to the travaux préparatoires which had led to the adoption of that definition,[184] he made three comments:

(a) The definition of reservations had not given rise to lengthy discussion when the 1969 Vienna Convention was being drawn up;

(b) The contractual definition of reservations proposed by the first Special Rapporteur, James Brierly, whereby they were understood as offers to other contracting parties, had evolved into the idea of a unilateral statement;

(c) The definition of reservations had gradually become separate from that of interpretative declarations and reactions to such declarations. The last Special Rapporteur, Sir Humphrey Waldock, had considered that interpretative declarations belonged in the chapter relating to interpretation.

491. The Special Rapporteur noted that the codification, in the next two Vienna Conventions, of the law of treaties concluded by international organizations and on State succession in respect of treaties had had implications for the definition of reservations itself (art. 2, para. 1 (d), of the 1986 Vienna Convention and art. 2, para. 1 (j), of the 1978 Convention).

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[183] A/CN.4/491, paras. 27-30.

[184] A/CN.4/491/Add.1, paras. 53-68.

492. The result of the various contributions had been that none of the three Vienna Conventions gave a comprehensive definition of reservations, and the Special Rapporteur had therefore drafted a composite text[185] combining all the contributions. The resulting definition, which he called the "Vienna definition", could be used at the beginning of chapter I of the Guide to Practice.

493. In discussing the background and elements of the definition, the Special Rapporteur recalled that it had been adopted without significant doctrinal or political debates[186] and that, in the three Conventions, it had been placed under the heading "Use of terms" (rather than "Definitions"), to show clearly that the definitions contained therein were only "for the purposes of the present Convention". Nonetheless, State practice and judicial decisions had conformed that definition without worrying whether or not the Vienna Conventions were actually applicable in the situations in which States used the definition. Thus, States explicitly invoked it in their practice inter se, particularly when converting an interpretative declaration into a reservation or in their pleadings in contentious cases. As for judicial decisions, suffice it to recall, among others, the case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic[187] (English Channel) in 1977, the Temeltasch case before the European Commission of Human Rights in 1982[188] and the Inter-American Court of Human Rights in its 1983 opinion on restrictions on the death penalty.

494. The Special Rapporteur noted that contemporary doctrine was almost unanimously in favour of the Vienna definition, which had acquired its "letters of nobility" and was the obligatory starting point for any consideration of the definition of reservations, even though some writers still proposed their own definitions. Nonetheless, according to the Special Rapporteur, certain problems persisted, and hence the Commission could make a useful contribution by refining and supplementing the Vienna definition.

495. To that end, the Special Rapporteur pointed out that the Vienna definition contained three formal components: a unilateral statement; the moment when the

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[185] Ibid., para. 82.

[186] Ibid., para. 53.

[187] United Nations, Reports of International Arbitral Awards, vol. XVIII, p. 3.

[188] Decision of 5 May 1982, European Commission of Human Rights, Decisions and Reports, April 1983.

State or international organization expressed its consent to be bound by the treaty; and its wording or designation. It must also contain a substantive element, namely, that the reservation was intended to exclude or to modify the legal effect of certain provisions of the treaty.

(i) Unilateral statement

496. A reservation did not necessarily have to have the formal nature of a unilateral statement. The first Special Rapporteur, James Brierly, had had a "contractual" (or "conventional") conception of reservations, believing that they represented an agreement among the parties whereby they limited the effects of the treaty in its application to one or more of them. That conception, which was incompatible with the Vienna regime, was subsequently discarded. Although the relevant articles were silent on the form that the statement must take, the Special Rapporteur felt that it had to be written, as expressly stated in article 23 of the 1969 and 1986 Conventions. However, he also warned against taking an unduly formalistic approach to the "unilateralism" of reservations, in respect of both similar reservations made by States with special ties of solidarity and reservations formulated jointly by several States.[189] It would therefore be useful to indicate in the Guide to Practice that such practices were not incompatible with the definition of reservations; that was the purpose of draft guideline 1.1.1.

(ii) Moment of formulation of a reservation

497. The Special Rapporteur drew attention to the fact that, in the Vienna definition, the long list of moments when reservations could be made was neither exhaustive nor rigorous. Even if there were elements that related more to the legal regime of reservations, the emphasis placed on the moment served to prevent the potential parties to a treaty from formulating reservations at any time at all, something that would create great insecurity in contractual relations. Nevertheless, it would be better to specify that the list in article 2, paragraph 1 (d), was the same in spirit as that in article 11, and that was the purpose of draft guideline 1.1.2.

(iii) Reservations having territorial scope

498. In that context, the Special Rapporteur recalled that a reservation could also be made at the time of the notification that the application of a treaty extended to a territory, an action which in itself did not of course constitute a reservation. That practice had so far not given rise to any objections, a fact which had led him to formulate draft guideline 1.1.3. On the other hand,

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[189] For example, the States of the European Union, which make, if not reservations, at least interpretative declarations and joint objections.

as could be seen from article 29 of the Vienna Convention, a statement by which a State purported to exclude the application of a treaty to a territory meant that it sought "to exclude or to modify" the legal effect which the treaty would normally have, and such a statement therefore constituted, according to the Special Rapporteur, a "true" reservation, rationae loci (draft guideline 1.1.8).

(iv) Wording or designation

499. The last formal component of the Vienna definition related to the condemnation of "legal nominalism" reflected in the phrase "however phrased or named", was largely established in practice and should have a counterpart in interpretative declarations; however, it does not call for any particular draft guideline.

(v) Exclusion or modification of the legal effect of certain provisions of the treaty

500. The substantive element of the Vienna definition was "teleological" in nature (the reservation purported "to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization"). It presented technical and complex problems.

501. The first set of problems was created by the expression "certain provisions", in respect of which it had been proposed - wrongly, according to the Special Rapporteur - that the word "provisions" should be replaced by the word "obligations".[190] On the other hand, there were in practice "transverse" reservations which related not to any particular provision, but, for example, to the way the State or international organization which had formulated it intended to implement the treaty as a whole or which consisted of excluding certain categories of persons from the application of the treaty. That practice was reflected by draft guideline 1.1.4.

502. A second set of problems was raised by the objective pursued by the author of the reservation. The Special Rapporteur noted that it was that feature which distinguished reservations from interpretative declarations or reservations relating to non-recognition which, in reality, did not constitute reservations when their authors did not intend to produce any kind of effect on the treaty itself or to rule out the application of the treaty in their relations with the non-recognized party. On the contrary, a statement did constitute a genuine reservation when the author stated that it did not accept any contractual relation with the entity it did not recognize, because such an act then had a direct impact on the application of the treaty as between the two parties. That type of unilateral statement could be formulated when the non-recognized entity

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[190] For example, P.-H. Imbert; see A/CN.4/491/Add.2, paras. 72-88.

became a party to the treaty, i.e., after the expression by the author of its consent to be bound by it (draft guideline 1.1.7).

(vi) "To exclude or modify" - "extensive" reservations

503. The precise contours of the expression "extensive reservations" raised very sensitive problems and had led to doctrinal controversy.[191] More particularly, the Special Rapporteur wondered whether the expression could also cover an extension of the rights or obligations of the author, a point on which the doctrinal debate was rather obscure. In his view, if what was involved was a unilateral commitment by the formulating State to go beyond what the treaty imposed on it, such a commitment did not constitute a reservation within the meaning of the Vienna definition because its possible binding force was not based on the treaty. In fact, ratification, signature or accession were merely an opportunity for the State which made the statement to make a unilateral commitment and, if it was bound, it was only for the reasons put forward by the International Court of Justice in the 1974 Nuclear Tests case (draft guideline 1.1.5).

504. On the other hand, if a State or international organization sought, by means of a reservation, to limit the obligations imposed on it by the treaty and, as a corollary, to limit the rights which the other contracting parties derived from the treaty, its statement constituted a reservation. Although a State could not, by means of a reservation, impose on other parties to the treaty a new obligation in respect of the obligations of general international law, the reserving State could nevertheless, through its reservation, deny other parties to the treaty the rights which they had, not under general international law, but solely by virtue of the treaty. On the other hand, the State could not "legislate" and attempt by means of a reservation to impose obligations on other States which did not stem from general international law (draft guideline 1.1.6).

(c) Definition of interpretative declarations

505. In introducing the part of his report covering the distinction between reservations and interpretative declarations, the Special Rapporteur made three general statements:

(a) First, the three Vienna Conventions were silent on the question of interpretative declarations, whereas the Commission had studied the matter in 1956 and 1962 while developing its draft articles on the law of treaties. While the silence on the part of the Vienna Conventions had drawbacks, such as a lack of guidelines and pointers, it did have the advantage that, unlike the case of reservations, there was no conventional wisdom about interpretative declarations. The Commission could therefore innovate on the basis of its members' convictions and the needs of contemporary international society;

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[191] A/CN.4/492/Add.1, paras. 72-88.

(b) Second, there was abundant practice[192] proving that States used interpretative declarations as widely as they did reservations. The practice was of very long standing, going back to the Final Act of the Congress of Vienna in 1815, and had developed in parallel with the traditional multilateral format;

(c) Third, defining interpretative declarations was made more difficult by two complicating factors: (i) unclear terminology and (ii) States' foreign policies and legal strategies. In the former case, the question arose of whether it did not smack too much of Cartesian rationalism to analyse unilateral declarations that affected the treaties about which they were made by setting up an opposition, in binary mode, between "reservations" and "interpretative declarations". Indeed, even though some languages seemed to have adopted the binary mode, others, English for example, seemed to have a much more diverse approach. Nevertheless, none of the States - including the English-speaking ones - or the international organizations that had replied to the questionnaires had taken issue with classifying unilateral declarations into two categories.

506. The terminology was no less unclear as a result, however, and it did happen that States either did not qualify their declarations at all or used various tortuous or ambiguous forms of words.[193]

507. Ambiguous wording was indeed an example of the unclear terminology difficulty: even if such forms of words were used inadvertently sometimes, they were very often used deliberately either to get round a prohibition on reservations or, as one State said in its response to the questionnaire, to avoid creating the bad impression that making a reservation might.

508. The Special Rapporteur pointed out that interpretative declarations had been given a "negative" definition - as not being reservations - during the travaux préparatoires for the 1969 Vienna Convention and indicated that he had arrived at a positive definition by empirical means (draft guideline 1.2). The definition contained elements that were common both to reservations and to interpretative declarations: they were both unilateral declarations, however phrased or named.

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[192] See A/CN.4/491/Add.4, paras. 236-239.

[193] Ibid., paras. 261-266.

(i) Joint formulation of interpretative declarations

509. Joint formulation was one of the points in common between reservations and interpretative declarations, but practice for the latter was well established[194] (draft guideline 1.2.1).

(ii) Phrasing and name; interpretative declarations where reservations are prohibited

510. The Special Rapporteur mentioned the repudiation of nominalism in the definition both of reservations and of interpretative declarations ("however phrased or named") and wondered whether States should not be taken at their word by holding to whatever name they gave their unilateral declarations (as Japan had recommended in 1969 and in accordance with a suggestion from a member of the Commission in 1997). However, he recognized that such an approach would be very far removed from practice and would be equivalent to the Commission's making law, which was not its function. He had therefore adopted a more realistic approach by taking as his basis the judicial decisions of the Human Rights Committee, the Commission on Human Rights and the European Court of Human Rights, and he proposed taking the view that even if the title of an interpretative declaration did not prove what its legal nature was, it did create a presumption - not an irrefragable one, however - particularly when the author (of such a declaration) denominated some declarations "reservations" and others "interpretative declarations" (draft guideline 1.2.2).

511. Similarly, when reservations were prohibited under a treaty, it would seem that there were grounds for presuming, again not irrefragably, that the author of an interpretative declaration with the same object had acted in good faith and had made what was indeed an interpretative declaration (draft guideline 1.2.3).

(iii) Conditional interpretative declarations

512. A conditional interpretative declaration occurred when the State or international organization making the declaration subordinated its consent to be bound by a treaty to its own interpretation, in the same way that the author of a reservation made the reservation the condition for being so bound.[195]

513. Such a declaration was much closer to a reservation than a simple interpretative declaration, and the temporal element was therefore essential, which it was not for simple interpretative declarations. Also, if any

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[194] Ibid., para. 275.

[195] The Special Rapporteur gives as an example the declaration by France on signing Additional Protocol II of the Treaty of Tlatelolco, UNTS, vol. 634, p. 281, and vol. 936, p. 420.

uncertainty existed about the exact scope of interpretative declarations or about their nature, conditional or otherwise, the general rule of interpretation set out in article 31 of the Vienna Convention, supplemented if necessary by the additional means provided for under article 32 of the same Convention, must be used (draft guideline 1.2.4).

(iv) Declarations of general policy and informative declarations

514. Declarations of general policy had the same object as the treaty, but their aim was not to interpret the treaty but to set out the author's policy towards the object of the treaty (draft guideline 1.2.5).

515. In an informative declaration, a State indicated how it intended to discharge its obligations at the internal level, with no impact on the rights and obligations of the other States (draft guideline 1.2.6).

516. Neither of the above was a reservation or an interpretative declaration.

(v) Distinction between reservations and interpretative declarations

517. Interpretative declarations differed from reservations in two ways: (a) the temporal element, in other words the moment when the declaration could be made, and (b) the teleological factor, the author's purpose in making that declaration. The latter was the crucial factor: while a reservation sought to exclude or modify the legal effect of the treaty's provisions in their application to the author, an interpretative declaration sought only to interpret the treaty or some of its provisions, i.e., to clarify its meaning or scope, as had been affirmed on many occasions in the decisions of the Permanent Court of International Justice and the International Court of Justice. The interpretation thus accepted the provisions to which it referred as well as their legal effect. The Special Rapporteur pointed out that the latter was quite clear in the definition of an interpretative declaration (1.2) but that if the Commission so desired, it could be restated even more explicitly in guidelines clearly defining the criteria for both reservations and interpretative declarations (draft guidelines 1.3.0 and 1.3.0 bis). Although there were advantages and disadvantages in both explaining and not explaining the criteria, States must be made aware of that point in the Guide to Practice.

518. The Special Rapporteur was of the opinion that the temporal element, unlike in the definition of reservations,[196] should not be included in the general definition of interpretative declarations (with the exception of conditional interpretative declarations). Although reservations were made upon concluding

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[196] The Special Rapporteur even felt that the inclusion of the temporal element in the definition of reservations had been "unfortunate" and was attributable rather to reasons of legal policy related to the stability of treaty relations and the unity of treaties.

the treaty, interpretative declarations dealt with the interpretation of the treaty, which was itself an aspect of its implementation, a point on which the Special Rapporteur agreed with his predecessor, Sir Humphrey Waldock, who held that interpretative declarations could be made at any time - during negotiations, when signing or ratifying, or later during ensuing practice.

(vi) Method of distinguishing between reservations and interpretative declarations

519. The Special Rapporteur indicated that the method could in fact follow the model set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties, containing the general rule of interpretation of treaties. By following not only the practice of States but, especially, the judicial decisions of the Inter-American Court of Human Rights, the European Court of Human Rights and the arbitral tribunal set up to hear the English Channel case, unilateral declarations must be interpreted in good faith in accordance with the meaning to be given to the terms in their context, pending verification of the result obtained by this method through recourse to supplementary interpretative measures, in particular the travaux préparatoires (draft guideline 1.3.1).

(vii) Scope of the definitions

520. Referring to questions raised concerning the permissibility of reservations during the Commission's discussion of the definition of a reservation, the Special Rapporteur pointed out that a definition was not a binding provision and that all the definitions contained in the first part of the Guide to Practice were without prejudice to their legal scope or, especially, their permissibility. A reservation (or an interpretative declaration) could be permissible or impermissible but nevertheless remained a reservation or interpretative declaration. The very fact that a unilateral declaration was defined as either a reservation or an interpretative declaration conditioned its permissibility (draft guideline 1.4).

2. Summary of the debate

521. With regard to draft guidelines 1.1.5 and 1.1.6, which deal with the problem of so-called "extensive" reservations, certain members pointed out that statements designed to increase the obligations of their author (as in the case of the statement by the representative of South Africa concerning the General Agreement on Tariffs and Trade, which was cited by the Special Rapporteur[197]) were extremely rare; that type of statement could be either a proposal to extend a treaty, which could be accepted or not by the other States parties, or an interpretative statement, giving an extensive, even if erroneous, interpretation

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[197] A/CN.4/491/Add.3, para. 213.

of the obligations of its author under the treaty. With regard to draft guideline 1.1.6, certain members noted that the draft guideline gave only an a contrario definition of reservations, particularly in the light of the principle of reciprocity, which was strictly applied in conventions, and that it was very similar to the general definition of reservations. Moreover, several members stated that it was impossible, strictly speaking, to "add a new provision to the treaty" by means of a simple unilateral statement.

522. Other members drew attention to the problems caused by the wording of both draft guideline 1.1.5 and draft guideline 1.1.6. Mention was made of a hypothetical case of a reservation to a particular treaty suspending the application of a general regime deriving from international law: such a reservation would revive the obligations deriving from general international law. On the other hand, in the case of a treaty that prohibited reservations but permitted statements of a "transitional" nature designed to limit the scope and nature of the obligations imposed by the treaty (as in the recent example of the Rome Statute establishing an International Criminal Court), it might be asked whether such an instrument established two regimes - one applicable to reservations and the other to statements - or whether there was only one option available to States. The opinion was also expressed that the two draft guidelines could be combined into a single guideline dealing mainly with the "modification" of the treaty itself (and not of its effects) by means of a statement that did not constitute a reservation. In the view of certain members, the problems raised by these two draft guidelines went far beyond simple drafting problems. Indeed, they were not convinced by the distinction made in draft guidelines 1.1.5 and 1.1.6 between unilateral statements that constituted reservations and those that did not. As far as the theory of law was concerned, there was no substantial difference between a statement limiting and a statement increasing the obligations imposed on their author. In this regard, the question was raised, since the Vienna definition referred only to "modifying", why one should exclude from the definition of reservations statements designed to increase the obligations of their author and which could, if the case arose, as a result of reciprocity, increase the obligations of the other parties as well.

523. Other members, on the other hand, believed that the two draft guidelines could be very useful in the Guide to Practice, since they dealt with statements designed to increase the obligations of their author and with statements designed to limit the obligations of their author, which therefore constituted reservations. While it was not necessary at the current stage to decide on the nature of the first type of statements or on the question whether, for example,

they were governed by rules applicable to unilateral legal acts, the concept of reservations would thus be clarified. In this regard, the question was also raised of the possibility of substituting certain obligations under the treaty with others that were more or less equivalent.[198]

524. Summarizing the debate, the Special Rapporteur first stressed the true meaning of the terms used in the Vienna definition. It seemed incorrect to state that a reservation purported to limit the legal effect of a treaty's provisions. "Modify" was the word used, hence the problem of extensive reservations.

525. Second, the Special Rapporteur said that he believed that statements designed to increase the obligations of their author constituted unilateral legal acts even if several members considered that the Commission should not take a decision on their nature at the current stage. The real question was whether a State could, by means of a reservation, increase the obligations of other States: according to the Special Rapporteur, two very different aspects must be distinguished:

(a) The first was to determine whether a reservation could increase the obligations of the parties normally deriving from the treaty. There was no doubt that this was the normal function of any reservation designed to neutralize certain provisions of the treaty;

(b) The second aspect concerned the possibility, for the reserving State, to increase the obligations of its contracting partners, not only with respect to the treaty but also with respect to general international law. It was hard to imagine that a State could modify customary international law to its benefit by making a reservation. It seemed unreasonable to consider that a modifying "reservation" could increase the rights of the reserving State and the obligations of the other contracting States under customary international law; moreover, the designation of such practices as "reservations" would have very serious consequences for small developing States which, lacking highly organized legal services, would be deemed to have accepted such reservations after a certain period of time: they would also be bound by a sort of "legislation" that would be imposed on them from outside.

526. Third, the Special Rapporteur noted that several unilateral statements called "reservations" by their authors (as, for example, Israel's reservation to

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[198] Mention was made of a reservation by Japan to the Food Aid Convention of 1971 (under which the contracting parties pledged to supply wheat to certain countries) by means of which Japan, not being a wheat producer, stated that it would supply a quantity of rice equivalent in "monetary" terms to the quantity of wheat that it would have had to supply.

the 1949 Geneva Conventions seeking to add the Star of David to the emblems of the Red Cross[199]) were in fact, whether designed to increase or to limit the obligations of the other contracting States, proposals on amendments that entered into force only if they were accepted by the other parties. Given the tacit acceptance of reservations, the problem was to determine whether such "reservations" were true reservations.

527. With regard to draft guideline 1.1.7, several members, while recognizing the practicality of a clarification of the nature of statements of non-recognition, wondered if they were really reservations. They pointed out that it was the application of the treaty as a whole, and not specific provisions of it, that was excluded between the party making the statement and the non-recognized party, which did not follow the Vienna definition to the letter. Furthermore, it had been observed that any reservation assumed a treaty-based or contractual relationship between the reserving party and the other parties to the treaty, while in the case of statements of non-recognition, it was in fact the contractual capacity of a party that had been denied. Consequently, such statements belonged more in the area of recognition or interpretative declarations than in treaty law, particularly as it pertained to reservations. They were simply made at the moment when the State expressed its consent to be bound by the treaty. It was also noted that the discussion had left the realm of treaty law and had entered a highly political area, where a distinction must be made between non-recognition of States, of Governments and also of international organizations. Since the practice of that type of statement was sufficiently widespread, participation by a larger number of States in treaties should not be discouraged by a "preventive" qualification.

528. According to another point of view, the draft guideline went far beyond the Vienna regime and could give the impression that the Commission intended to include the greatest possible number of situations under the regime on reservations. In that regard, the view had been expressed that if such statements could be made at any time at all, they were even farther removed from the "classic" characteristics of reservations. Moreover, such statements could prove to have varied effects depending on the type of treaty (for example restricted treaties) to which they were made. It was also stated that classifying them as reservations and attempting to apply that regime to them could sometimes lead to absurd results, for example in a case where reservations were prohibited by the treaty or when mutual recognition among all the parties was lacking.

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[199] A/CN.4/491/Add.3, para. 225.

529. In the view of some members, the question should be asked in the opposite way: could a reservation exclude the application of the treaty in its totality between two parties? If so, it was a question of knowing if that was necessarily related to an act of non-recognition. The possibility was raised of linking such statements to "offers" or agreements inter se. It was also suggested that the phenomenon should be discussed further or studied at the same time as interpretative declarations.

530. Other members stated that it was a question of unilateral declarations sui generis, "statements of exclusion" or statements producing effects similar to reservations which still should have a place in the Guide to Practice (perhaps in an annex) because they expressed an indisputable reality. The view was also expressed that they constituted statements of refusal of the capacity of the non-recognized entity to enter into treaty relations, falling rather within the province of the conclusion of treaties, and that the draft guideline should say specifically that such statements did not constitute reservations.

531. On the other hand, to some members, those statements constituted true reservations, in that they were aimed at modifying the legal effect of the treaty, which was the function of a reservation. Nevertheless, the general regime of reservations was not entirely applicable: the treaty as a whole was excluded, and the moment of formulation of the statements could vary. In that regard, the members recalled that although recognition was a political matter, it had legal effects.

532. Summarizing the debate, the Special Rapporteur noted that five main issues had been raised:

(a) The first was a philosophical problem: even if it was a "political" matter, as several members seemed to believe, he thought that it should be discussed in an effort to determine its legal consequences;

(b) Besides their being currently named "reservations", which was an indication in that direction, he did not see why reservations could not be made rationae personae as well as rationae materiae or rationae loci. Moreover, if a State could exclude the application of a treaty as a whole between two parties by means of an objection, he wondered why it could not also do so by means of a reservation. It seemed to him too formalistic to adhere strictly to the wording "certain provisions" as contained in the Vienna definition;

(c) However, he recognized that even by calling such statements reservations, some characteristics of the regime of reservations (objections and others) could not be applied to them;

(d) The problem of the exact moment when such statements could be made remained unresolved; in order to protect the stability of treaty relations, the

Commission would do well to specify that they might be made at the time when the non-recognized entity became party to the treaty, and not at any time whatsoever;

(e) As the sui generis "qualifications" were unsatisfactory, in his view, he would be inclined to consider, at the conclusion of the debate and contrary to what he initially thought that if such statements were not actually reservations they could be thought of as statements similar to declarations of general policy or statements made in relation to the treaty which did not produce legal effects on its application, although he would reserve judgement on that point.

533. With regard to the introduction of the part of the report concerning interpretative declarations,[280] several members said they agreed with the Special Rapporteur's view that the greatest confusion of terminology could be found in the area of interpretative declarations and they thought that draft guidelines 1.2 and 1.2.2 clarified the matter and helped to avoid vague and ambiguous situations. From one point of view, besides the problem of terminology, the definition played an essential role in the determination of the permissibility of a unilateral declaration. However, support had been expressed for the Special Rapporteur's view that interpretative declarations must first be defined before problems of permissibility could be tackled. It had also been pointed out that the Vienna regime was not entirely silent concerning interpretative declarations, general rules of interpretation and content applicable to them. Nevertheless, the distinction between interpretative declarations and reservations was sometimes very difficult to make. It had also been noted that the general rules of interpretation contained in the Vienna Convention were intended to clarify the meaning of an agreement of intentions between two or more parties, and the Commission should think about whether it would be possible to transpose them to interpretative declarations, i.e., to unilateral statements.

534. Other members wondered if it was necessary to study interpretative declarations in detail and had subsequently decided that it was, stressing that there must be a clear definition of the criteria for distinguishing them from reservations. (All the Special Rapporteur's proposals, with the possible exception of that contained in draft guideline 1.2.1, on the joint formulation of an interpretative declaration, were in fact aimed at such a definition of criteria.) The view was expressed, however, that conditional interpretative declarations constituted genuine reservations and should be treated as such,

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[280] A/CN.4/491/Add.4.

especially with regard to their conformity with the object and purpose of the treaty.

535. With regard to conditional interpretative declarations, the question was raised as to whether if another contracting party had raised an objection such declarations would be an obstacle to the entry into force of a treaty between the author of the conditional declaration and the objecting State.

536. As to the definition of interpretative declarations (draft guideline 1.2), several members felt that it met the need to clear up misunderstandings surrounding the notion of interpretative declarations. It was also noted that the definition could be matched with its negative "counterpart", namely, that interpretative declarations purported neither to modify nor to exclude the legal effect of certain provisions of the treaty.

537. Other members said that a limit must be placed on the far too subjective power of interpretation (introduced especially by the expression "attributed by the declarant"), saying that the interpretation should conform to the letter and spirit of the corresponding provision of the treaty.

538. From another point of view, interpretative declarations often dealt with the conditions of implementation of the treaty (as in the 1982 Convention on the Law of the Sea), and that element could also be included in the definition.

539. Summarizing the debate, the Special Rapporteur noted that, in essence, a definition did not have normative content as such, but that it was an essential prerequisite for determining the permissibility of unilateral declarations and the application of the legal regime relating to both. The main problem was obviously to determine whether the legal regime was transposable to that of interpretative declarations, and to what extent. But it was too soon to undertake that debate. For his part, he felt that although in many cases the regime of conditional interpretative declarations could be brought into line with that of reservations, it did not seem possible to completely assimilate the two notions.

C. Text of the draft guidelines on reservations to treaties provisionally adopted by the Commission on first reading

1. Text of the draft guidelines

540. The texts of the draft guidelines 1.1, 1.1.1 [1.1.4],[201] 1.1.2, 1.1.3 [1.1.8], 1.1.4 [1.1.3] and 1.1.7 [1.1.1] provisionally adopted by the Commission at its fiftieth session are produced below.

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[201] The numbers in square brackets refer to the numbering in the third report of the Special Rapporteur (A/CN.4/491 and Add.1-6).

RESERVATIONS TO TREATIES

Guide to Practice

1. Definitions

1.1 Definition of reservations

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

1.1.1 [1.1.4] Object of reservations[202]

A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which a State, or an international organization, intends to apply the treaty as a whole.

1.1.2 Instances in which reservations may be formulated

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

1.1.3 [1.1.8] Reservations having territorial scope[203]

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement, constitutes a reservation.

1.1.4 [1.1.3] Reservations formulated when notifying territorial application

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.7 [1.1.1] Reservations formulated jointly

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

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[202] This draft guideline will be re-examined in the light of the discussion on interpretative declarations and could be reformulated if necessary.

[203] The text of this draft guideline will be reviewed together with guideline 1.1.1 at the next session of the Commission.

Defining a unilateral statement as a reservation is without prejudice to its permissibility and its effects under the rules relating to reservations.[204]

2. Text of the draft guidelines with commentaries thereto

RESERVATIONS TO TREATIES

Guide to Practice

1. Definitions

1.1 Definition of reservations

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

Commentary

(1) The definition of reservations adopted by the Commission is none other than the composite text of the definitions contained in the Vienna Conventions of 1969, 1978 and 1986, to which no changes have been made.

(2) This method, which the Commission proposes to follow in principle in the other chapters of the Guide to Practice, is consistent with the position which it adopted in 1995[205] and confirmed in 1997,[206] namely that there should be no change in the relevant provisions of the Vienna Conventions on the law of treaties. This approach met with general approval during the debate on the topic of reservations to treaties in the Sixth Committee of the General Assembly.

(3) Article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties of 23 May 1969 gives the following definition of reservations:

> "'Reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".

(4) This definition reproduces the text proposed by the Commission in 1996 in its final draft articles on the law of treaties,[207] and did not give rise to

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[204] The title and the location of this guideline will be determined at a later stage.

[205] See Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 491.

[206] Ibid., Fifty-second Session, Supplement No. 10 (A/52/10), paras. 116-123.

[207] Yearbook ... 1996, vol. II, p. 193.

lengthy discussion either within the Commission[208] or during the Vienna Conference. The text of the definition was reproduced in the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1986 Vienna Convention on Treaties between States and International Organizations or between International Organizations[209] and gave rise to hardly any discussion.

(5) It should be noted, however, that article 2, paragraph (1) (j), of the 1978 Convention and article 2, paragraph (1) (d), of the 1986 Convention do not purely and simply reproduce the text of article 2, paragraph (1) (d), of the 1969 definition. Each of them includes a clarification made necessary by the respective purposes of the two instruments:

(a) The 1978 Convention specifies that a reservation can be made by a State "when making a notification of succession to a treaty";

(b) The 1986 Convention adds that an international organization can make a reservation when it expresses its consent to be bound by a treaty by an act of formal confirmation.

(6) It is these differences that made it necessary to establish for the purposes of the Guide to Practice a composite text, including the additions made in 1978 and 1986, rather than purely and simply to reproduce the 1969 text.

(7) This definition, embodied in judicial decisions[210] and used in practice by States when making reservations themselves or reacting to reservations made by other contracting parties, has met with general approval in the writings of

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[208] See the definitions proposed by Brierly (*Yearbook ... 1950*, vol. II, doc. A/CN.4/23, para. 84), Fitzmaurice (*Yearbook ... 1956*, vol. II, p. 112) and Waldock (*Yearbook ... 1962*, vol. II, p. 36) and the proposals of the Drafting Committee of 1962 (*Yearbook ... 1962*, vol. I, p. 264) and 1965 (*Yearbook ... 1965*, vol. I, p. 335).

[209] During the Commission's elaboration of the draft articles on this topic, a simplification of the definition was proposed in order to avoid a lengthy enumeration of the moments when a reservation may be made in accordance with the 1969 definition (see *Yearbook ... 1974*, vol. II, part I, p. 306). In 1981, however, the Commission reverted to a text based on the 1969 text (see *Yearbook ... 1981*, vol. II, part II, pp. 122 and 124).

[210] See, for example, the arbitral decision of 30 June 1977, *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, United Nations, *Reports of International Arbitral Awards*, vol. XVIII, paras. 54-55, pp. 39-40 (the Court of Arbitration had taken note of the parties' agreement to consider that article 2, paragraph (1) (d), of the 1969 Convention, to which they were not parties, correctly defined the reservations, and had drawn the necessary conclusions) or the decision of 5 May 1982 of the European Commission of Human Rights, *Case concerning Temeltasch (Decisions and Reports)*, April 1983, paras. 69-82, pp. 130-131.

jurists, even though some authors have criticized it on specific points and have suggested certain additions or amendments.[211]

(8) This is also the position of the Commission, some members of which nevertheless drew attention to lacunae or ambiguities in the Vienna definition. It was stated, inter alia, that:

(a) This definition combined elements that were purely definitional with others that were more closely identified with the legal regime of reservations, particularly with regard to the moment when a reservation may be formulated;

(b) Moreover, the enumeration of these moments, even when supplemented by the additions made in 1978 and 1986, remained incomplete and did not match the list of means of expression of consent to be bound contained in article 11 of the 1969 and 1986 Conventions;

(c) The definition should be supplemented by a mention of the requirement that reservations must be made in writing; and

(d) It should be made clear that a reservation could - and in the view of one member could only - seek to limit the legal effect of the provisions in respect of which it is made.

(9) The Commission was of the view, however, that these objections did not constitute sufficient grounds to call into question the Vienna definition, which could and should be supplemented and clarified in the Guide to Practice, since that was precisely the purpose and raison d'être of the Guide.

(10) Given that the definition used in the Guide to Practice is, from the outset, the one that stems from the Vienna Conventions, the commentary to article 2, paragraph (1) (d), of the Commission's draft article, which was reproduced in the Vienna Convention, retains all its relevance:

> "The need for this definition arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the Treaty as adopted".[212]

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[211] See in particular the definitions proposed by Pierre-Henri Imbert, Les réserves aux traités multilatéraux (Paris, Pédone, 1979), p. 18, and Marjorie Whiteman, Digest of International Law, vol. 14, 1970, p. 137. See also Frank Horn, Reservations and Interpretative Declarations to Multilateral Treaties, T.M.C. Asser Instituut, Swedish Institute of International Law, vol. 5, 1998, p. 83.

[212] Yearbook ... 1966, vol. II, commentary to article 2, para. (11), p. 206.

(11) This explanation brings out clearly the function of the definitions contained in this first part of the Guide to Practice:[213] the aim is to distinguish between reservations and other unilateral statements made with respect to a treaty (the largest group of which is that of interpretative declarations), since the two are subject to different legal regimes.

(12) One should also be aware of the limitations of an endeavour of this kind: however much care is taken to define reservations and to distinguish them from other unilateral statements which have certain elements in common with them, some degree of uncertainty inevitably remains. This is inherent in the application of any definition, which is an exercise in interpretation that depends in part upon the circumstances and context and inevitably brings into play the subjectivity of the interpreter.

1.1.1 [1.1.4][214] Object of reservations[215]

A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which a State or an international organization intends to implement the treaty as a whole.

Commentary

(1) Taken literally, the Vienna definition[216] appears to exclude from the general category of reservations unilateral statements that concern not one specific provision or a number of provisions of a treaty, but the entire text. The aim of draft guideline 1.1.1 is to take into account the well-established practice of across-the-board reservations in the interpretation of this definition, a simple reading of which would lead to an interpretation that was too restrictive and contrary to the reality.

(2) The wording used by the authors of the Vienna Conventions has been criticized, first, because of the connection it establishes "between the reservation and the provisions of a convention ... Indeed, a reservation is intended to eliminate not a provision, but an obligation".[217] This criticism

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[213] The "provisional plan of the study" contained in the second report of the Special Rapporteur consists of six parts (I. Unity or diversity of the legal regime for reservations to multilateral treaties, a topic that was taken up in chapter II of the second report (A/CN.4/477); II. Definition of reservations; III. Formulation and withdrawal of reservations, acceptances and objections; IV. Effects of reservations, acceptances and objections; V. Fate of reservations, acceptances and objections in the case of succession of States; VI. The settlement of disputes linked to the regime for reservations) (A/CN.4/477, para. 37).

[214] The numbers in square brackets refer to the numbering in the Special Rapporteur's third report (A/CN.4/491 and Add.1-6).

[215] This draft guideline will be re-examined in the light of the discussion on interpretative declarations and could be reformulated if necessary. (On the conditions for adoption of this draft, see paragraph (12) of the commentary to draft guideline 1.1.)

[216] See guideline 1.1 above.

[217] Pierre-Henri Imbert, Les réserves aux traités multilatéraux (Paris, Pédone, 1979), p. 15 (italics in the text).

does not appear to be well founded, inasmuch as it relates to the definition given in article 2, paragraph 1 (d), of the 1969 Convention, which takes care to make it clear that the objective of the author of the reservation is to exclude or to modify the legal effect of certain provisions of the treaty to which the reservation applies and not the provisions themselves.[218]

(3) The second criticism of the wording relates to the use of the expression "certain provisions". It has been noted that it was explained "out of the very commendable desire to exclude reservations that are too general and imprecise [[219]] and that end up annulling the binding character of the treaty", a consideration regarding which it might be queried whether it "should be placed in article 2. In fact, it relates to the validity of reservations. However, it is not because a statement entails impermissible consequences that it should not be considered a reservation. Moreover, practice provides numerous examples of perfectly valid reservations that do not focus on specific provisions: they exclude the application of the treaty as a whole under certain well-defined circumstances".[220]

(4) We should not confuse, on the one hand, a general reservation characterized by the lack of specificity and general nature of its content and, on the other, an across-the-board reservation concerning the way in which the State or the international organization that formulates it intends to apply the treaty as a whole, but which cannot necessarily be criticized for lack of precision.

(5) Across-the-board reservations are a standard practice and, as such, have never raised any particular objection. The same is true of reservations that exclude or limit the application of a treaty:

(a) To certain categories of persons;[221]

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[218] The wording of article 21, paragraph 1, of the 1969 and 1986 Conventions is more questionable, in that it defines the legal effects of reservations as amendments to the provisions to which they refer.

[219] Cf. the observations of the Government of Israel on the first draft of the International Law Commission (Yearbook ... 1965, vol. II, p. 14) or the statement by the representative of Chile at the first session of the Vienna Conference, in 1968 (A/CONF.39/11/SR.4, para. 5)

[220] Pierre-Henri Imbert, Les réserves aux traités multilatéraux (Paris, Pédone, 1979), pp. 14-15. Similarly, see, for example, Renata Szafarz, "Reservations to Multilateral Treaties", The Polish Yearbook of International Law, 1970, p. 296.

[221] See, for example, the United Kingdom's reservation concerning the application of the International Covenant on Civil and Political Rights to members of the armed forces and prisoners (Multilateral treaties deposited with the Secretary-General - status as at 31 December 1996, United Nations publication, Sales No. E.97.V.5, chap. IV, p. 129) or that of Guatemala concerning the application of the Customs Convention on the Temporary Importation of Private Road Vehicles of 4 June 1954 to natural persons only (ibid., chap. XI.A.8, p. 431).

(b) Or of objects, especially vehicles;[222]

(c) Or to certain situations;[223]

(d) Or to certain territories;[224]

(e) Or in certain specific circumstances;[225]

(f) Or for special reasons relating to the international status of their author;[226]

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[222] See, for example, Yugoslavia's reservation to the effect that the provisions of the Convention relating to the Unification of Certain Rules concerning Collisions in Inland Navigation shall not apply to vessels exclusively employed by the public authorities (ibid., chap. XII.3, p. 663) or that of Germany to the effect that the Convention on the Registration of Inland Navigation Vessels of 25 January 1965 would not apply to vessels navigating on lakes and belonging to the German Federal Railways (ibid., chap. XII.4, p. 665).

[223] See, for example, the Argentine reservations to the 1982 Convention of the International Telecommunication Union with regard to the possible increase in its contribution and the possibility that the other parties would not observe their obligations under the Convention (reply by Argentina to the questionnaire on reservations); or the reservation of France on signature of the final proceedings of the Regional Administrative Conference for the Planning of Maritime Radiobeacons in the European Maritime Area in 1985, concerning the requirements for the adequate operation of the French maritime radio-navigation service using the multi-frequency phase metering system (reply by France to the questionnaire on reservations).

[224] See draft guideline 1.1.3 below.

[225] See France's reservation to the General Act of Arbitration of 26 September 1928 to the effect that "in future [the said accession to the Act] shall not extend to disputes relating to any events that may occur in the course of a war in which the French Government is involved" (ibid., p. 1006). (Similar reservations were made by the United Kingdom and New Zealand.) See also the reservations of the majority of States parties to the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Cases, and of Bacteriological Methods of Warfare, whereby that instrument would cease to be binding for the Government of the State making a reservation with regard to any enemy State whose armed forces or whose allies did not respect the prohibitions which were the object of the Protocol. Status of Multilateral Arms Regulation and Disarmament Agreements, 4th ed., 1992, vol. I, pp. 11-21).

[226] See, for example, Austria's and Switzerland's reservations to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 10 April 1972, with regard to preserving their status of neutrality (Swiss reply to the questionnaire on reservations) or Austria's similar reservation to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 10 December 1976 (Multilateral Treaties ..., chap. XXVI.1, p. 892) or those of the member countries of the European Community to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of 13 January 1993, to the effect that the provisions of the Convention would be implemented in accordance with their obligations arising from the rules of the

(g) Or to the author's national laws;[227]

etc.

(6) Some of these reservations have given rise to objections on grounds of their general nature and lack of precision,[228] and it may be that some of them are tainted by impermissibility for one of the reasons specified in article 19 of the 1969 and 1986 Vienna Conventions. But this impermissibility stems from the legal regime of the reservations and is a separate problem from that of their definition. Furthermore, the inclusion of general reservations in the category of reservations constitutes an indispensable prerequisite to assessing their validity under the rules relating to the legal regime governing reservations; an impermissible reservation (a) is still a reservation and (b) cannot be declared impermissible unless it is a reservation.

(7) Another element that supports a non-literal interpretation of the Vienna definition relates to the fact that some treaties prohibit across-the-board reservations or certain categories of such reservations, in particular general reservations.[229] Such a clause would be superfluous (and inexplicable) if unilateral statements designed to bring about a general modification of the legal effect of a treaty did not constitute reservations.

(8) The abundance and coherence of the practice of across-the-board reservations (which are not always imprecise and general reservations) and the absence of objections in principle to this type of reservations indicate a social need that it would be absurd to challenge in the name of abstract legal logic. Moreover, the interpretation of rules of law should not be static;

Treaties establishing the European Communities to the extent that such rules were applicable (ibid., chap. XXVI.3, p. 904).

[227] See, for example, the reservations of the United States, Italy and Japan to the effect that those countries would apply the International Wheat Agreement of 14 March 1986 provisionally within the limitations of internal legislation (ibid., chap. XIX.28, p. 766) or the reservation of Canada to the Convention on the Political Rights of Women of 31 March 1953 "in respect of rights within the legislative jurisdiction of the provinces" (ibid., chap. XVI.1, p. 704).

[228] See, for example, the objections of numerous countries to the reservations made by the Maldives to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 concerning the Islamic Shariah (ibid., chap. IV.8, pp. 177-182) and also the reservations made by Egypt to the same Convention. See, in this respect, the articles by Anna Jenefsky, "Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", Maryland Journal of International Law and Trade, vol. 15, 1991, pp. 199-233, and by R. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", Virginia Journal of International Law, vol. 30, 1990, pp. 643-716. See also the objections of certain countries to the reservation of the United States of America to the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948, relating to the Constitution of the United States (ibid., chap. IV.1, p. 88).

[229] This is so in the case of article 64, paragraph 1, of the European Convention on Human Rights or article XIX of the Inter-American Convention on Forced Disappearance of Persons (International Legal Materials, vol. XXXIII, p. 1532, 1994).

article 31, paragraph 3, of the Vienna Convention invites the interpreter of treaty rules to take into account, "together with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", and, as the International Court of Justice has strongly underlined, a legal principle should be interpreted in the light of "the subsequent development of international law".[230]

(9) In order to remove any ambiguity and avoid any controversy, it consequently appears reasonable and useful to establish, in the Guide to Practice, the broad interpretation that States actually give to the apparently restrictive formula of the Vienna definition with regard to the expected effect of reservations. Moreover, contrary to the concerns expressed by some members of the Commission, the formulation utilized should not lead to confusion with interpretative declarations, some of which may indeed purport to indicate "the way in which the State or international organization intends to implement the treaty as a whole", but it is made quite clear here that the provision relates only to unilateral statements, which, for the rest, constitute reservations that meet the requirements of the Vienna definition; this follows from the words "A reservation ..." with which the draft guideline begins.

(10) It is evident that such precision in the definition in no way prejudges the permissibility (or impermissibility) of the reservations: whether they relate to certain provisions of the treaty or the treaty as a whole, they are subject to the substantive rules relating to the validity (or permissibility) of reservations.

(11) In this respect, the word "may" used in draft guideline 1.1.1 should be interpreted not in the permissive sense implying that States and international organizations "have the right to", but from a purely descriptive point of view as meaning that, in fact, unilateral statements of this across-the-board characteristic are indeed reservations, quite independently of their permissibility. This clearly follows from its inclusion in the first part of the Guide to Practice, which deals exclusively with their definition, and is expressly confirmed by the draft guideline reproduced below and provisionally not numbered.

(12) Some members of the Commission expressed doubts regarding the wording of draft guideline 1.1.1 [1.1.4]. In their view, the wording applied as much to interpretative declarations as to across-the-board reservations. Other members felt that fear to be unjustified, given that at the outset the draft guideline indicated that it related to "a reservation". Nevertheless, the Commission decided that the appropriateness of the wording employed would be "tested" in the light of the discussions relating to interpretative declarations.

1.1.2 Cases in which a reservation may be formulated

The cases in which a reservation may be formulated contained in guideline 1.1 include all the means of expressing consent to be bound by a treaty referred to in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

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[230] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, para. 51.

Commentary

(1) The purpose of this draft guideline is to seek to remedy a flaw in the wording of the 1969 and 1986 Vienna Conventions, namely that articles 2, paragraph 1 (d), on the one hand, and 11, on the other hand, are not formulated in the same terms, which might give rise to confusion.

(2) As indicated in the commentary to guideline 1.1,[231] the inclusion in the Vienna definition of a list of the cases in which a reservation may be made has been criticized, *inter alia*, on the ground that the listing was incomplete and would have been more in place in the articles of the Conventions relating to the legal regime for reservations than in the article defining them.

(3) Illogical though it may appear in the abstract, the idea of including time limits on the possibility of making reservations in the definition of reservations itself has progressively gained ground,[232] given the magnitude of the drawbacks in terms of stability of legal relations of a system which would allow parties to formulate a reservation at any moment. It is in fact the principle *pacta sunt servanda* itself which would be called into question, in that at any moment a party to a treaty could, by formulating a reservation, call its treaty obligations into question; in addition, this would excessively complicate the task of the depositary.

(4) The fact nonetheless remains that criticisms have been levelled at the restrictive listing in the Vienna Conventions of the moments at which formulation of a reservation can take place. On the one hand, it has been felt that it was incomplete, *inter alia*, in that it did not initially take into account the possibility of formulating a reservation on the occasion of a succession of States;[233] but the 1978 Vienna Convention on Succession of States with respect to Treaties remedied this omission. Moreover, many authors have pointed out that, in some cases, reservations could validly be formulated at moments other than those provided for in the Vienna definition,[234] and in particular that a treaty may make express provision for the possibility of

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[231] Para. 8.

[232] The oldest definitions of reservations did not generally include this element *ratione temporis* (see, for example, those proposed by David Hunter Miller (*Reservations to Treaties: The Effect and Procedure in Regard Thereto*, Washington D.C., 1919, p. 76), Dionisio Anzilotti (*Cours de droit international*, French translation by G. Gidel, Paris, Sirey, vol. I, 1929, p. 399) and R. Genet ("Les réserves dans les traités", *Revue de droit international et des sciences diplomatiques et politiques*, 1932, p. 103)).

[233] Cf. Renata Szafarz, op. cit. (note 220 above), p. 295.

[234] Cf. ibid. and Giorgio Gaja, "Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification - Études en l'honneur de Roberto Ago* (Giuffré, Milan, 1987), vol. 1, pp. 310-313; D. W. Greig, "Reservations: Equity as a Balancing Factor", *Australian Yearbook of International Law*, 1995, pp. 28-29; Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988), pp. 41-43; and Paul Reuter, *Introduction au droit des traités*, 3rd ed., revised and expanded by Philippe Cahier (Paris, Presses Universitaires, 1995), p. 71.

formulating a reservation at a moment other than the time of signature or of expression of consent to be bound by the treaty.[215]

(5) Express consideration of this possibility in the Guide to Practice does not, however, appear to be useful: it is indeed true that a treaty may provide for such an eventuality, but this is then a treaty rule, a lex specialis that constitutes a derogation from the general principles established by the Vienna Conventions, which are only intended to substitute for an absence of will, and present no impediment to derogations of this kind. The Guide to Practice with respect to reservations is of the same nature, and it does not appear appropriate to recall under each of its headings that States and international organizations may depart from it by including in the treaties that they conclude reservations clauses which institute special rules in that respect.

(6) On the other hand, even if one confines oneself to general international law it appears that the list of cases in which the formulation of a reservation can take place, as laid down in article 2, paragraph 1, of the Vienna Conventions, does not cover all the means of expressing consent to be bound by a treaty. Yet the spirit of this provision is indeed that a State may formulate (or confirm) a reservation when it expresses its consent, and that it can do so only at that moment. Too much importance must thus not be attached to the letter of this enumeration, which is incomplete and, moreover, does not correspond to that appearing in article 11 of the 1969 and 1986 Conventions.[216]

(7) The Commission had moreover clearly perceived the problem when it discussed the draft articles on the law of treaties between States and international organizations or between international organizations, in that initially, on the proposal of its Special Rapporteur, Mr. Paul Reuter, it had simplified the definition of reservations and intended to say only that they could be made "by a State or by an international organization when signing or consenting ... to be bound by a treaty",[217] which was an implicit reference to article 11 of the future Convention. However, out of a concern to depart as little as possible from the 1969 text the Commission finally modelled its draft on it, thus abandoning the idea of a useful simplification.[218]

(8) The differences in wording between article 2, paragraph 1 (d), and article 11 of the 1969 and 1986 Conventions lie in the omission from the former of these provisions of two possibilities contemplated in the latter: "exchange of

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[215] See, inter alia, Pierre-Henri Imbert, Les réserves aux traités multilatéraux (Paris, Pédone, 1979), p. 12.

[216] Article 11 of the 1986 Vienna Convention reads as follows:

> "1. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.
>
> "2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed."

[217] Yearbook ... 1974, vol. II, Part 1, p. 145; see also the commentary on the draft in question, ibid., p. 307.

[218] See note 209 above.

instruments constituting a treaty" and "any other means if so agreed". As one member of the Commission pointed out, it is rather improbable that a general multilateral treaty could consist of an exchange of letters. Nevertheless, the possibility cannot be entirely ruled out; nor can the development of means of expressing consent to be bound by a treaty other than those expressly listed in articles 2, paragraph 1 (d), and 11 of the Vienna Conventions. It is to avoid problems arising on these occasions that draft guideline 1.1.2 specifies that no particular importance should be attached to the difference in the wording of these two provisions.

(9) It should be noted that the purpose of this guideline is not to fill the gaps in the list that appears in the Vienna definition, particularly the omission of the possibility of reservations formulated when notifying territorial application of a treaty; that is the purpose of draft guideline 1.1.4. More generally, the Commission intends to discuss the problems posed by the formulation of reservations in detail in chapter II of the Guide to Practice.

(10) At the suggestion of one of its members, the Commission wondered whether, just as by means of draft guideline 1.1.2 it had sought to harmonize the Vienna definition with article 11 of the 1969 and 1986 Conventions, it should not also specify that the expression "notification of succession" appearing in article 2, paragraph 1 (g), of the 1978 Vienna Convention on Succession of States in respect of Treaties must be interpreted solely in the light of article 18 of that Convention. It seemed to the Commission, however, that it would be preferable to specify that in the part of the Guide to Practice dealing with succession of States in respect of reservations to treaties.

1.1.3 [1.1.8] Reservations having territorial scope[239]

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement, constitutes a reservation.

Commentary

(1) As its title indicates, this draft guideline concerns unilateral statements by which a State[240] purports to exclude the application of a treaty, in whole or in part, *ratione loci*: the State consents to the application of the treaty as a whole *ratione materiae* except in respect of one or more territories which, in one form or another, are under its jurisdiction.

(2) In the past, such reservations consisted primarily of what were known as "colonial reservations", or statements by which the administering Powers

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[239] The text of this draft guideline will be reviewed together with draft guidelines 1.1.1 at the next session of the Commission.

[240] For obvious reasons, this situation generally does not apply to international organizations, although cases could arise in which an organization with territorial competence might formulate a reservation of this type.

announced their intention to apply or not to apply a treaty or certain provisions thereof to all or some of their colonies.[241] Given the current marginal nature of the colonial phenomenon, the problem rarely arises in this form today. It may, however, be useful to determine the legal nature of such statements from the perspective of intertemporal law, with a view to evaluating their permissibility or determining their effect in respect of a treaty that remains in force even though the colonial situation that gave rise to such statements no longer exists.

(3) The practice of formulating territorial reservations persists in the context of non-colonial situations, either because a State excludes the application of a treaty to all or part of its own territory[242] or because it is competent, for some other reason, to enter into international commitments on behalf of the territory or territories in question, but does not intend to do so.[243]

(4) Although the point has been challenged,[244] these unilateral statements constitute reservations within the meaning of the Vienna definition: when

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[241] See the reservations of Belgium (excluding the Belgian Congo and the territory of Ruanda-Urundi) or of the British Empire (excluding certain colonies, etc.) or of France (excluding all protectorates, colonies, possessions or overseas territories under the sovereignty or authority of the French Republic) to the Convention on the International Régime of Railways of 9 December 1923 (Multilateral Treaties ..., chap. II.27, p. 1000) or the reservations of the United Kingdom excluding the application of the Geneva Conventions of 1958 on the territorial sea and the contiguous zone, on the high seas and on fishing in the high seas to the "States in the Persian Gulf" (ibid., chap. XXI.1, p. 803; XXI.2, p. 809; and XXI.3, p. 813). See also the reservations attached by the Government of the United Kingdom to its consent to be bound by many treaties between 1965 and 1980 following the illegal proclamation of independence by Southern Rhodesia (such as its reservations to the two Covenants of 1966 ("the provisions of the Covenant shall not apply to Southern Rhodesia unless and until they inform the Secretary-General of the United Nations that they are in a position to ensure that the obligations imposed by the Covenant in respect of that territory can be fully implemented") (ibid., chaps. IV.3 and IV.4, pp. 115 and 129) or to the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966 (ibid., chap. IV.2, p. 101).

[242] For an example of the total exclusion of the entire territory of a State, see the reservation of the United States to the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP) of 1 September 1970 (and the objections raised to this reservation) (Multilateral Treaties ..., chap. XI.B-22, p. 610).

[243] For an early example, see the declaration made by Denmark upon ratifying the Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes of 7 June 1930 excluding Greenland from the scope of application of the Convention (Multilateral Treaties ..., part II, chap. II.8, p. 969) or, for a more recent example, the declaration made by Norway in 1985 excluding the territories of Svalbard and Jan Mayen from the application of the Conventions on road traffic and road signs and signals of 8 November 1968 (ibid., chap. XI.B.19, p. 599).

[244] See, for example, Frank Horn, op. cit. (see note 234 above), pp. 100-101.

formulated on one of the occasions specified, they purport to exclude or to modify the legal effect of the entire treaty[245] or of certain provisions thereof in their application to the author of the statement. In the absence of such a statement, the treaty would apply to the State's entire territory, pursuant to the provisions of article 29 of the 1969 and 1986 Vienna Conventions.[246] Such statements are genuine reservations because they purport the partial exclusion or modification of the treaty's application, which constitutes the very essence of a reservation.

(5) Some members of the Commission expressed doubts on this score, arguing, for example, that a territorial reservation may be formulated only if it is expressly provided for in the treaty to which it relates. This is a very strict interpretation of article 29 of the 1969 and 1986 Conventions, which calls for no explicit provision to this effect and admits the possibility of partial territorial application if it "appears" from the treaty or may otherwise be established. In any case, this objection concerns not the definition of reservations, but the conditions in which they are valid. Moreover, a unilateral statement provided for by a treaty is still a reservation even if it is expressly authorized by the treaty; this follows, for example, from article 19 (b) of the 1969 and 1986 Conventions, which envisages the possibility that treaties may provide that only specified reservations may be made. Conversely, if a treaty expressly envisages the possibility of territorial reservations, this does not mean, unless otherwise clearly indicated by the authors of the treaty, that other reservations are necessarily prohibited.[247]

(6) It was also stated that it would be difficult to place such territorial reservations under the general legal regime of reservations and, in particular, to formulate objections to them. This is true if such a reservation is explicitly or implicitly allowed by the treaty, which according to a majority of members of the Commission should be the case with respect to any territorial reservation.[248] Thus, the impossibility of objecting to such a reservation arises not from its territorial nature but from its status as a reservation authorized by the treaty. In this respect, there is no distinction between territorial reservations and other types of authorized reservations.

(7) Lastly, while recognizing that such statements were genuine reservations when they purported to exclude or to modify the legal effect of certain provisions of the treaty, other members questioned whether that was so in the case of statements purporting to totally exclude the treaty's application to a given territory. However, the Commission felt that there were no grounds for drawing a distinction between reservations ratione materiae and reservations

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[245] See draft guideline 1.1.1[1.1.4] above.

[246] Article 29 of the 1969 Convention reads: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."

[247] It may be noted, in this connection, that article 19 (b) concerns only treaties providing that "only specified reservations" may be made. This does not mean that a treaty could not provide for the possibility of formulating certain reservations without prohibiting other reservations.

[248] This point could probably be addressed in a subsequent guideline of the Guide to Practice relating to article 19 (b) of the 1969 and 1986 Conventions.

ratione loci. Such a distinction follows neither explicitly nor implicitly from the Vienna definition.

(8) It seems self-evident that a territorial reservation must be made, at the latest, by the time the State expresses its consent to be bound by the treaty, if it purports to totally exclude the application of the treaty to a given territory. On this point, there is no ground on which to differentiate the definition of territorial reservations from the general definition of reservations. This is not the case when the State having jurisdiction over the territory in question intends to exclude or modify only partially the treaty's application to this territory. In this case, the reservation may be made not only at the time of signature or of final expression of consent to be bound by the treaty, but also when the State extends the application of the treaty to this territory, which had not previously been subject to its provisions. This particular ratione temporis aspect of certain territorial reservations is addressed in draft guideline 1.1.4 [1.1.3].

1.1.4 [1.1.3] Reservations formulated when notifying territorial application

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of the treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

Commentary

(1) Whereas draft guideline 1.1.3 [1.1.8] deals with the scope ratione loci of certain reservations, guideline 1.1.4 [1.1.3] deals with the time factor of the definition: the moment at which certain "territorial reservations"can be made.

(2) Generally speaking, a State makes such a reservation upon signing the treaty or when it expresses its definitive consent to be bound by it. This is in fact the only time at which a territorial reservation may be made if that reservation seeks to exclude the territory from the application of the treaty as a whole.[249] That may not however be the case for reservations which seek to exclude or modify the legal effect of some provisions of the treaty in their application to a territory not previously covered by the treaty.

(3) The territorial application of a treaty may indeed vary across time either because a State decides to extend the application of a treaty to a territory under its jurisdiction which was not previously covered by the treaty,[250] or because the territory came under its jurisdiction after the entry into force of the treaty, or for any other reason not covered by the provisions concerning reservations to the treaty. In such cases, the State responsible for the territory's international relations may purely and simply extend the treaty to that territory, but it may also choose to do so only partially; in the latter case, upon notifying the depositary of the extension of the territorial application of the treaty, the State also includes in the notification any new reservations specific to that territory. There is no reason to attempt to prevent it from doing so: such a restriction would make it more difficult to extend the territorial application of the treaty and is quite unnecessary

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[249] See paragraph (8) of the commentary to draft guideline 1.1.3 [1.1.8] above.

[250] For example by withdrawing a territorial reservation (see draft guideline 1.1.3 [1.1.8] above).

provided that the unilateral statement is made in accordance with the legal regime of reservations and is therefore permissible only if compatible with the purpose and objective of the treaty.

(4) Some examples of reservations made under such conditions are the reservations made by the United Kingdom on 19 March 1962 upon extending application of the Convention Relating to the status of Stateless Persons of 28 September 1954 to Fiji, and the State of Singapore and the West Indies[251] and the reservation made by the Netherlands in extending the Convention relating to the Status of Refugees of 28 July 1951 to Suriname on 29 July 1971.[252]

(5) There are recent examples of reservations made upon notification of territorial application: on 27 April 1993, Portugal notified the Secretary-General of the United Nations of its intention to extend to Macau application of the two 1966 International Covenants on human rights; that notification included reservations concerning the territory.[253] On 14 October 1996, the United Kingdom notified the Secretary-General of its decision to apply the Convention on the Elimination of All forms of Discrimination against Women of 18 December 1979 to Hong Kong, with a certain number of reservations.[254] Those reservations caused no reaction or objection on the part of the other Contracting Parties.

(6) It would therefore seem wise to make clear, as has in fact been suggested in the writings of jurists,[255] that a unilateral statement made by a State in the context of notification of territorial application constitutes a reservation if it meets the relevant conditions set out by the Vienna definition thus supplemented. To so specify would not of course in any way prejudice issues related to the permissibility of such reservations.

1.1.7 [1.1.1] Reservations formulated jointly

The joint formulation of a reservation by a number of States or international organizations does not affect the unilateral nature of that reservation.

Commentary

(1) One of the fundamental characteristics of reservations is that they are unilateral statements,[256] and the majority of the Commission is convinced that this element of the Vienna definition is not subject to exceptions even if,

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[251] Multilateral Treaties ..., chap. V.3, p. 246.

[252] Ibid., chap. V.2, p. 238.

[253] See Multilateral Treaties ..., chap. IV.3, p. 118, note 16.

[254] Ibid., chap. IV.8, p. 183, note 10.

[255] Cf. Renata Szafarz, op. cit. (see note 220), p. 295.

[256] Although in the past some authors have had a "contractual" conception of reservations (cf. Charles Rousseau, Principes généraux de droit international public (Paris, Pédone, 1944), vol. 1, p. 290; see also the definition proposed by James L. Brierly in 1950, IALC Yearbook ... 1950, vol. 2, pp. 238-239, para. 84). The adoption of the 1969 Vienna Convention silenced the controversies over this point.

formally, nothing prevents a number of States or international organizations from formulating a reservation jointly, that is to say in a single instrument addressed to the depositary of a multilateral treaty in the name of a number of parties.

(2) The practice of concerted reservations is well established: it is accepted current practice for States sharing common or similar traditions, interests or ideologies to act in concert with a view to formulating identical or similar reservations to a treaty. That was often done by the eastern European States which pledged allegiance to socialism,[257] the Nordic countries,[258] and the States members of the Council of Europe or the European communities.[259] But each of these reservations was nonetheless formulated individually by each of the States concerned, and this thus poses no problem in relation to the Vienna definition.

(3) Nevertheless, during the discussion of the draft which was to become article 2, paragraph 1 (d), of the Vienna Convention, one member of the Commission pointed out that a reservation could be not only concerted, but also joint.[260] At the time, this remark elicited no response, and in practice, it does not appear that States have to date had recourse to joint reservations.[261] The possibility of such reservations cannot however be excluded. It is all the more probable in that, though there are no joint reservations, there are nowadays fairly frequent cases of:

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[257] See, for example, the reservations by Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Romania and the Union of Soviet Socialist Republics to section 30 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946; some of these reservations have been withdrawn since 1989 (cf. Multilateral Treaties ..., pp. 40 and 41).

[258] See, for example, the reservations of Finland and Sweden to articles 35 and 58 of the Vienna Convention on Consular Relations of 24 April 1963 (cf. ibid., chap. III.6, pp. 72 and 73) and those of Denmark, Finland, Iceland and Sweden to article 10 of the International Covenant on Civil and Political Rights of 16 December 1966 (ibid., pp. 123, 124 and 127).

[259] See, for example, the reservations by Austria (No. 5), Belgium (No. 1), France (No. 6) and Germany (No. 1) to the same 1996 Covenant (ibid., pp. 121-124) and the "declarations" by all the States members of the European Community, made in that capacity, to the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (ibid., pp. 904-905).

[260] Statement by Mr. Paredes at the 651st meeting, 25 May 1962 (Yearbook ... 1962, vol. 1, p. 163, para. 87).

[261] The reservations formulated by an international organization are attributable to it, not to its member States; thus they cannot be termed "joint reservations".

(a) Joint objections to reservations entered by other parties;[262]

(b) Joint interpretative declarations which it is moreover not always easy to distinguish from reservations stricto sensu.[263]

(4) That the problem may arise in the future thus cannot be ruled out, and the Commission felt that it would be wise to anticipate that possibility in the Guide to Practice.

(5) The Commission felt that there could be nothing against the joint formulation of a reservation by a number of States or international organizations: it is hard to see what could prevent them from doing together what they can without any doubt do separately and in the same terms. This flexibility is all the more necessary in that, with the proliferation of common markets and of customs and economic unions, the precedents constituted by the joint objections and interpretative declarations referred to above will in all probability recur witn respect to reservations, given that such institutions often share competence with their member States, and it would be highly artificial to require the latter to act separately from the institution to which they belong. Moreover, in theoretical terms such a practice would certainly not be contrary to the practice of the Vienna definition: a single act on the part of a number of States can be regarded as unilateral if its addressee or addressees are not parties to it.[264]

(6) In practical terms, such joint reservations will also possess the great advantage of simplifying the task of the depositary - which would be able to address the text of the jointly formulated reservation to the other parties without having to increase the number of notifications - and of those other parties, which could if they wished react to it by means of a single instrument.

(7) The Commission considered the advisability of going further and envisaging the possibility of collective reservations, by which a group of States or international organizations would undertake not only to formulate the reservation jointly, but also to withdraw or modify it exclusively as a group. This would also imply that the other parties would have to accept it or object to it uniformly. Although this course was advocated by one member, it seemed to present more difficulties than advantages:

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[262] Thus, the European Community and its (then) nine member States objected, by means of a single instrument, to the "declarations" made by Bulgaria and the German Democratic Republic with respect to article 52, paragraph 3, of the Customs Convention on the International Transport of Goods under Cover of TIR Carnets, of 4 November 1975, which envisaged the possibility of customs or economic unions becoming Contracting Parties (see Multilateral Treaties ..., chap. XI.A-16, p. 449).

[263] See the declarations made by the European Economic Community and its member States, or by the latter alone, with respect, for example, to the United Nations Framework Convention on Climate Change of 9 May 1992 (ibid., chap. XXVII.7, p. 940), the Convention on Biological Diversity of 5 June 1992 (ibid., chap. XXVII.8, p. 944) and the Agreement of 4 August 1995 on straddling fish stocks (ibid., chap. XXI.7, pp. 856-857).

[264] This is a case of what may be termed "multi-partite unilateral acts"; on this point, see the first report by Mr. V. Rodriquez-Cedeño on unilateral acts of States (A/CN.4/486, paras. 79 and 133).

(a) In practical terms, it would constitute an obstacle to the withdrawal of reservations, which is often considered a "necessary evil",[265] by making the withdrawal of a joint reservation contingent upon the agreement of all the States or international organizations which formulated it;

(b) In theoretical terms, it would imply that a group of parties could impose upon the others the rules on reservations agreed upon by them, which is hardly compatible with the principle of privity to treaties; in other words, it might happen that a number of States or international organizations would agree to consider that the reservation jointly formulated by them might be withdrawn or modified only jointly, but such an agreement would be *res inter alios acta* with regard to the other Contracting Parties to the treaty to which the reservation related.

(8) These are the reasons for which the Commission, while envisaging the possibility of jointly formulated reservations, decided to specify that such reservations were nonetheless subject to the general regime of reservations, governed largely by their "unilateral" nature, which cannot be affected by such joint formulation.

(9) Moreover, it should be specified that the coordinating conjunction "or" used in draft guideline 1.1.7 [1.1.1][266] in no way excludes the possibility of reservations formulated jointly by one or more States and by one or more international organizations, and should be understood to mean "and/or". Nevertheless, the Commission considered that this formulation would make the text too cumbersome.

Additional guidelines

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Defining a unilateral statement as a reservation is without prejudice to its permissibility and its effects under the rules relating to reservations.

Commentary

(1) The above draft guideline was adopted provisionally by the Commission. Its title and its placement within the Guide to Practice will be determined at a later stage. In addition, the Commission will consider the possibility of referring, under a single caveat, both to reservations, which are the sole object of this guideline, and to interpretative declarations, which, in the view of some members, pose identical problems.

(2) However, this provisional adoption seemed necessary in order to clarify and specify the scope of the entire set of draft guidelines with respect to the definition of reservations adopted thus far, and to make their particular object quite clear.

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[265] See the statement made by Roberto Ago at the 797th meeting of the Commission, 8 June 1965, *Yearbook ... 1965*, vol. I, p. 166.

[266] "... by several States or international organizations ..."

(3) Defining is not the same as regulating. As "a precise statement of the essential nature of a thing",[263] the sole function of a definition is to determine the general category in which a given statement should be classified. However, this classification does not in any way prejudge the validity of the statements in question: a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established. A contrario, it is not a reservation if it does not meet the criteria set forth in these draft articles (and in those which the Commission intends to adopt in 1999), but this does not necessarily mean that such statements are permissible (or impermissible) from the standpoint of other rules of international law.

(4) Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime and in the first place for the assessment of its permissibility. It is only once a particular instrument has been defined as a reservation that a decision can be taken as to whether it is permissible or not, its legal scope can be evaluated and its effect can be determined. However, this permissibility and these effects are not otherwise affected by the definition, which requires only that the relevant rules be applied.

(5) Draft guideline ... is of particular importance in the light of draft guideline 1.1.1 [1.1.4], in which the verb "may" is used. As indicated in the commentary to that provision, this word should, in this context, be understood as purely descriptive and not as permissive; the Commission does not mean to indicate that an across-the-board reservation is or is not permissible, but only that a unilateral statement of this nature constitutes a reservation and, as such, is subject to the legal regime for reservations. Likewise, the fact that draft guideline 1.1.2 indicates that a reservation "may be formulated" in all of the cases referred to in draft guideline 1.1 and in article 11 of the 1969 and 1986 Vienna Conventions does not mean that such a reservation is necessarily permissible; its permissibility depends upon whether it meets the conditions stipulated in the law on reservations to treaties and, in particular, those stipulated in article 19 of these Conventions.

(6) More generally, the entire set of draft guidelines adopted thus far are interdependent and cannot be read and understood in isolation from one another.

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[263] The Oxford English Dictionary, 2nd ed. (Oxford, The Clarendon Press, 1989).

CHAPTER X

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme, procedures and working methods of the Commission and its documentation

1. Planning of the work of the current session

541. At the beginning of the session, a two-day seminar was held to commemorate the fiftieth anniversary of the Commission. The Commission had planned that the first part of the session in Geneva would be devoted to the discussion of the reports submitted by the Special Rapporteur with respect to the topics on the agenda of the Commission, whereas the second part of the session in New York would be devoted to the adoption of draft articles (with regard to the topics of reservations to treaties, State responsibility and international liability) and of the report of the Commission.

2. Work programme of the Commission for the remainder of the quinquennium

542. The Commission affirmed that the work programme for the remainder of the quinquennium set out by the Commission in its report on the work of its forty-ninth session[268] should be complied with to the extent possible.

3. Making available Special Rapporteur's reports prior to the session of the Commission

543. Reference was made to the recommendation contained in the report of the Commission at its forty-eighth session[269] that it would be "highly desirable that all reports should be available to Commission members some weeks before the commencement of the session, to enable study and reflection". Taking into account the time required for the editing, translation, reproduction and distribution of documents (normally six weeks prior to the session), the Commission decided that Special Rapporteurs should submit their reports to the Secretariat in time so as to ensure their prompt availability in all languages before the beginning of the session. In this connection, the Commission further decided that, in future cases, candidates for Special Rapporteur should be reminded of the demands that would be made in terms of time and effort upon their appointment.

544. The Commission stressed the advisability that the Secretariat be requested to send to all members of the Commission a copy of the letter sent to Special Rapporteurs reminding them of the deadline set for the submission of their reports. The Commission also requested the Secretariat to distribute to all

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[268] Official Records of the General Assembly, Fifty-second Session, Supplement No. 10 (A/52/10), paras. 220 and 221.

[269] Ibid., Fifty-first Session, Supplement No. 10 (A/51/10), para. 191.

members, upon receipt of the report and after its editing, the Special Rapporteur's report in the language submitted.

4. Organization of the fifty-first session

545. With reference to the suggestion contained in paragraph 224 of its report on the forty-ninth session, which stated that to enhance efficient organization of the work, the membership for the following session of the Bureau, or at least, the Chairman and the Chairman of the Drafting Committee, should be agreed upon at the end of a session rather than at the beginning of a session as had been the case, the Planning Group took note that the Eastern European members would nominate the chairmanship of the Commission and the Latin American members would nominate the chairmanship of the Drafting Committee. Members were urged to consult so as to complete the nomination process.

B. Commemoration of the fiftieth anniversary of the Commission

546. Pursuant to a decision of the Commission at its forty-ninth session, a seminar was held at Geneva on 21 and 22 April 1998 to commemorate the fiftieth anniversary of the Commission. The theme of the seminar was the critical evaluation of the Commission's work and lessons learned for its future, which was discussed by five panels focusing upon the following topics: (a) overview of the work of the International Law Commission 1948-1998: international responsibility and liability - comments on the Commission's approach; (b) State immunities: current problems inherited from the past?; (c) law of treaties: questions remain open; (d) future topics; (e) problems of the international legislative process and uses and perils of codification. Members of the academic community, diplomats and legal advisers of Governments and international organizations were invited to participate in the discussion.

547. The proceedings of the seminar will be published and disseminated to interested institutions for the purpose of the wider appreciation of international law.

548. Making Better International Law: The International Law Commission at 50 was published in June 1998 to commemorate the fiftieth anniversary of the establishment of the Commission. It contained the proceedings of the Colloquium on the Progressive Development and Codification of International Law held on 28 and 29 October 1997. The Secretary-General provided the preface to the publication, which was divided into three parts: Part I consisted of oral

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Ibid., Fifty-second Session, Supplement No. 10 (A/52/10), para. 224.

Ibid., para. 229. The General Assembly welcomed this decision in para. 19 of its resolution 52/156.

presentations of papers and open-floor discussion, organized according to the following themes: (a) overview of the international lawmaking process and the role of the International Law Commission; (b) major complexities encountered in contemporary international lawmaking; (c) selection of topics for codification and progressive development by the Commission and its working methods; (d) the Commission's work and the shaping of international law; enhancing the Commission's relationship with other lawmaking bodies and relevant academic and professional institutions; (e) making international law more relevant and readily available; and (f) the influence of the International Court of Justice on the work of the International Law Commission and the influence of the Commission on the work of the Court. Part II contained the written submissions of papers received. Part III reproduced the decisions and conclusions of the Commission on its programme, procedures and working methods adopted at its forty-eighth session and the statute of the International Law Commission in both English and French.

549. The Analytical Guide to the Work of the International Law Commission, 1949-1997 was published in July 1998 as a contribution by the Codification Division to commemorate the fiftieth anniversary of the Commission, and complements the publication The Work of the International Law Commission, currently in its fifth edition. The Guide is intended as a tool to facilitate research into the Commission's contribution to the codification and progressive development of international law during its first 50 years of existence. It is organized by topics, subdivided into categories and stages of consideration within the Commission, allowing the reader to trace the development of each topic from inception to conclusion.

550. The International Law Commission Web site was created by the Codification Division to commemorate the fiftieth anniversary of the Commission. The primary purpose of the Web site is to disseminate information regarding the activities of the Commission to as wide an audience as possible, through the electronic medium. As more of the documents and reports of the Commission are transformed into an electronic format and posted on the Internet, the Web site will also serve as a supplement to the published hard-copy versions of those documents and reports. It includes the following: information on the fiftieth session of the Commission: an introduction to the Commission, including a brief historical synopsis; information regarding the composition and membership of the Commission, and its activities during its forty-eighth, forty-ninth and fiftieth sessions; a discussion of its programme of work; on-line copies of the reports of the Commission, as well as of various texts adopted by the Commission, or based on its work; and an on-line version of the Analytical Guide to the Work of

the International Law Commission, 1949-1997. This Web site will be maintained by the Division.

C. Long-term programme of work

551. At its current session, the Planning Group re-established the Working Group on the long-term programme of work to consider topics which might be taken up by the Commission beyond the present quinquennium.

552. The Working Group was chaired by Mr. Ian Brownlie and reported to the Planning Group.[272]

553. Bearing in mind its recommendation contained in paragraph 238 of the report on its forty-ninth session,[273] the Commission agreed that the selection of topics for the long-term programme of work should be guided by the following criteria: the topic should reflect the needs of the States in respect of the progressive development and codification of international law; the topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; that the topic is concrete and feasible for progressive development and codification. The Commission further agreed that it should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.

554. The Commission took note of the report of the Planning Group, in which a number of topics were identified and examined. These topics dealt with different and important aspects of international law such as human rights, environment, responsibility and treaties. It further took note that in the report of the Group the following topics were identified for inclusion in the long-term programme of work: responsibility of international organizations; the effect of armed conflict on treaties; shared natural resources (confined groundwater and single geological structures of oil and gas); and expulsion of aliens. The Commission agreed with the recommendation of the Planning Group that a syllabus on these topics should be prepared for its consideration at the next session. It also agreed with the recommendation of the Group for the preparation of a feasibility study on a number of other topics to consider their suitability for inclusion in the long-term programme of work. The Commission decided that the Working Group on the long-term programme of work should be re-established at the next session to complete its task.

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[272] For the composition of the Working Group, see para. 8 above.

[273] Official Records of the General Assembly, Fifty-second Session, Supplement No. 10 (A/52/10).

D. Representation of the Commission at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

555. Having regard to the draft statute for an international criminal court, prepared by the Commission and submitted to the General Assembly at its forty-ninth session,[274] the Commission decided to designate Mr. James Crawford to represent the Commission at the Conference. Mr. Crawford addressed the Conference on 16 June 1998 and reported to the Commission on 27 July 1998.

556. On 27 July 1998, the Secretary of the Commission, who was the Executive Secretary of the Conference, transmitted the text of the following resolution adopted by the Conference in this regard:

> "The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court
>
> "Resolves to express its deep gratitude to the International Law Commission for its outstanding contribution in the preparation of the original draft of the Statute, which constituted the basis for the work of the Preparatory Committee [on the Establishment of an International Criminal Court]."

E. Cooperation with other bodies

557. At the 2537th meeting of the Commission, on 28 May 1998, Mr. Tang Chengyan, Secretary-General of the Asian-African Legal Consultative Committee (AALCC), expressed the Committee's continued interest in the topics currently on the ILC's agenda. As regards State responsibility, he informed the Commission that the law relating to countermeasures had been discussed at a seminar organized by AALCC in Tehran in January 1998 on "International extraterritorial application of national legislation: sanctions imposed against third parties". On reservations to treaties, a special meeting had been organized in the course of the thirty-seventh session of AALCC held at New Delhi. Other topics on the agenda of the Commission discussed by AALCC included: prevention of transboundary damage from hazardous activities; nationality in relation to the succession of States; and unilateral acts of States. At the same session, AALCC had also considered such other topics as the establishment of an international criminal court and the law of international rivers and the framework convention on the law of the non-navigational uses of international watercourses. AALCC would continue to maintain a close working relationship with the Commission.

558. At the 2554th meeting of the Commission, on 3 August 1998, Mr. Jonathan T. Fried, observer for the Inter-American Juridical Committee

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[274] Ibid., Forty-ninth Session, Supplement No. 10 (A/49/10), para. 91.

(IAJC), informed the Commission of the current activities of the Committee. IAJC had recently been involved in studies concerning the legal dimension of integration and international trade, in particular the most-favoured-nation clause as well as the right to information, including access to information and the protection of personal data. Furthermore, the Committee had prepared a draft convention against corruption, which was later adopted by the Organization of American States, and was developing model laws regarding illicit enrichment and transnational bribery. Other topics with which IAJC had been recently involved included enhancing the administration of justice in the Americas, inter-American cooperation against terrorism, the application of the United Nations Convention on the Law of the Sea by States of the hemisphere, a draft declaration on the rights of indigenous peoples as well as democracy in the inter-American system.

559. At the 2558th meeting, on 7 August 1998, Mr. Rafael A. Benitez, observer, informed the Commission of the work and activities of the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe. The Committee had established a working group of specialists on reservations to treaties which met in Paris in February 1998 and was to meet again in September 1998. Among the questions tackled or to be tackled by the group are the admissibility of reservations, the role of treaty bodies, the effects of illicit reservations and the practice of the members of the Council of Europe concerning reservations to treaties. The group would bear specially in mind the work being carried out by the Commission in this area. On the question of State practice relating to State succession and issues of recognition, CAHDI decided in March 1998 to prepare a report, in cooperation with some other institutions, aimed at analysing the practice of States members of the Council of Europe.

560. At the 2538th meeting, on 10 June 1998, Judge Stephen Schwebel, President of the International Court of Justice, gave the Commission an analytical account of the cases currently before the Court. He pointed out that the expanded caseload had inevitably led to increasingly lengthy delays in hearing cases. On average, States could now expect to wait about four years between initial filing and final judgment. Such delays had understandably given rise to a certain restiveness both inside and outside the Court. The basic problem was that the resources at the Court's disposal had not increased in line with the demand for its services and had even in recent years been cut. Consequently, the size of the translation services and archives department was not adequate, the judges at the Court did not have clerks, nor was there a corps in the Registry designed to assist them individually and the number of legal staff was very small. The Court, for its part, had taken a number of steps to expedite its procedures.

States were being encouraged, for example, to submit their pleadings consecutively rather than simultaneously and to curb the proliferation of annexes to pleadings which tended to absorb a disproportionate amount of translation time. Regarding the Court's making use of draft articles produced by the International Law Commission, the President pointed out that, over the years, the Court had habitually attached considerable importance to the conventions elaborated by the Commission. Although draft articles were only drafts and therefore could not be accorded the same weight, in cases where the parties to a dispute agreed that certain draft articles were an authoritative statement of the law on a particular point, the Court gave relevant weight to them.

561. On 9 June 1998, an informal working session was held between members of the Commission and of the legal services of the International Committee of the Red Cross (ICRC) and of the International Federation of Red Cross and Red Crescent Societies, to discuss common interests of those bodies.

F. Date and place of the fifty-first session and of the subsequent sessions

562. The Commission agreed that its next session would be held at the United Nations Office at Geneva from 3 May to 23 July 1999 (12 weeks). Taking into account the Commission's expected volume of work in sessions subsequent to 1999 and the need to organize its work in the most productive manner, the Commission also agreed that, barring unforeseen circumstances, sessions subsequent to 1999 should be scheduled to take place in two rather evenly split parts, with a reasonable period in between, for a total of 12 weeks, in Geneva. Accordingly, the Secretariat was requested to undertake the necessary administrative and budgetary requests in the light of that decision. In this connection, the Secretary of the Commission made a statement regarding the possible requirement of expenditure.

563. The Commission, on the recommendation of the Planning Group, decided to hold its session in 2000 at Geneva from 24 April to 2 June and from 3 July to 11 August 2000.

G. Representation at the fifty-third session of the General Assembly

564. The Commission decided that it should be represented at the fifty-third session of the General Assembly by its Chairman, Mr. Joao Clemente Baena Soares.[275]

H. International Law Seminar

565. Pursuant to General Assembly resolution 52/156, the thirty-fourth session of the International Law Seminar was held at the Palais des Nations from 11 to 29 May 1998. The Seminar is for advanced students specializing in international law and for young professors or government officials intended for an academic or diplomatic career or posts in the civil service in their country.

566. Twenty-three participants of different nationalities, mostly from developing countries, were able to take part in the session.[276] The participants in the Seminar observed plenary meetings of the Commission, attended specially arranged lectures and participated in working groups on specific topics.

567. The Seminar was opened by the Chairman of the Commission, Mr. Joao C. Baena Soares.

568. The following lectures were given by members of the Commission: Mr. Pemmaraju S. Rao: "The work of the International Law Commission"; Mr. Zdzislaw Galicki: "Nationality as a human right"; Mr. Mohamed Bennouna:

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[275] At its 2563rd meeting, on 14 August 1998, the Commission requested Mr. A. Pellet, Special Rapporteur on reservations to treaties, to attend the fifty-third session of the General Assembly under the terms of General Assembly resolution 44/35, of 4 December 1989.

[276] The following persons participated in the thirty-fourth session of the International Law Seminar: Ms. Irène Abessolo (Gabon); Mr. Agalar Atamoglanov (Azerbaijan); Mr. Yen The Banh (Viet Nam); Mr. Kesab Prasad Bastola (Nepal); Mr. Gela Bezhuashvili (Georgia); Mr. Mohamed Bouqentar (Morocco); Ms. Irena Cacic (Croatia); Ms. Mélanne Civic (United States of America); Mr. Juan Norberto Colorado Correa (Colombia); Ms. Patricia Galvao Teles (Portugal); Mr. Zafar Iqbal Gondal (Pakistan); Mr. Fernando Herera Rodriguez (Mexico); Mr. Kumbirai Hodzi (Zimbabwe); Ms. Alba Ibrahimi (Albania); Mr. Ali Reza Jahangiri (Islamic Republic of Iran); Mr. Gilberto Marcos A. Rodrigues (Brazil); Mr. Alejandro Moreno Diaz (Venezuela); Ms. Dewi Naidu (Denmark); Mr. Sanuel Nerquaye-Tetteh (Ghana); Mr. Giovanni Palec (Philippines); Ms. Suranjika Tittawella (Sri Lanka); Ms. Jeannette Tramhel (Canada); and Mr. Mncedisi Xego (South Africa). One additional selected candidate (from Zambia) did not attend. A Selection Committee, under the chairmanship of Professor Nguyen-Huu Tru (Honorary Professor, Graduate Institute of International Relations, Geneva), met on 11 March 1998 and selected 24 candidates out of 75 applications for participation in the Seminar.

"Diplomatic protection"; Mr. James Crawford: "State responsibility"; Mr. Teodor Melescanu: "Economic sanctions".

569. Lectures were also given by: Mr. Vladimir Petrovsky, Secretary-General of the Conference on Disarmament and Director-General of the United Nations Office at Geneva: "Multilateral disarmament"; Mr. Roy S. Lee, Director, Codification Division, Office of Legal Affairs, and Secretary to the International Law Commission: "The establishment of the International Criminal Court: Legal problems"; Mr. Michel Moussalli, Former Director, Office of the United Nations High Commissioner for Refugees (UNHCR): "The international protection of refugees"; Mr. Stéphane Jeannet, Legal Adviser, International Committee of the Red Cross: "International humanitarian law and the work of ICRC"; Mr. Mojtaba Kazazi, Chief Governing Council Secretariat, United Nations Compensation Commission: "Security Council action: The work of the United Nations Compensation Commission".

570. Seminar participants were assigned to one of four working groups for studying particular topics under the güidance of Commission members, as follows: "Reservations to treaties in domestic law" (Mr. Pellet); "Unilateral acts" (Mr. Candioti); "Diplomatic protection" (Mr. Hafner); and "State responsibility" (Mr. Dugard). Each group presented its findings to the Seminar; two groups presented papers, on "Unilateral acts of States" and on "Diplomatic protection", which were also shared with members of the Commission.

571. Participants were also given the opportunity to make use of the facilities of the United Nations Library and of the UNHCR Visitors' Centre, and to visit the museum of the ICRC.

572. The Republic and Canton of Geneva offered its traditional hospitality to the participants after a guided visit of the Alabama and Grand Council rooms.

573. Mr. Joao C. Baena Soares, Chairman of the Commission, Mr. Ulrich von Blumenthal, on behalf of the United Nations Office at Geneva, and Ms. Patricia Galvao Teles, on behalf of the participants, addressed the Commission and the participants at the close of the Seminar. Each participant was presented with a certificate of attendance.

574. The Commission noted with particular appreciation that the Governments of Denmark, Finland, Germany, Hungary, Ireland, Switzerland and Venezuela had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. Thanks to those contributions, it was possible to award a sufficient number of fellowships to achieve adequate geographical distribution of participants and to bring from developing countries deserving candidates who would otherwise have been prevented from taking part in the session. In 1998,

full fellowships (travel and subsistence allowance) were awarded to 15 candidates and partial fellowships (subsistence only) to 4 candidates.

575. Of the 760 participants, representing 144 nationalities, who have taken part in the Seminar since 1965, the year of its inception, 426 have received a fellowship.

576. The Commission stressed the importance it attached to the sessions of the Seminar, which enabled young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. The Commission recommended that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 1999 with as broad a participation as possible.

577. The Commission noted with satisfaction that in 1998 comprehensive interpretation services had been made available to the Seminar. It expressed the hope that the same services would be provided for the Seminar at the next session, despite existing financial constraints.

I. Gilberto Amado Memorial Lecture

578. The fourteenth Memorial Lecture, in honour of Gilberto Amado, the illustrious Brazilian jurist and former member of the Commission, was given on 13 May 1998 by Ambassador Ramiro Saraiva Guerreiro, former Minister of External Relations of Brazil, on the subject "The creation of the International Law Commission and some considerations on supposed new sources of international law".

579. The Gilberto Amado Memorial Lectures have been made possible through the generous contributions of the Government of Brazil, to which the Commission expressed its gratitude. It requested the Chairman to convey its gratitude to the Government of Brazil.

J. Tribute to the Secretary of the Commission

580. At its 2562nd meeting, on 14 August 1998, the Commission adopted a resolution acknowledging the important contribution made by Mr. Roy Lee to its work and to the codification and progressive development of international law; expressing its gratitude to him for his friendly and efficient assistance to the Commission, and extending its best wishes to him on the occasion of his retirement.